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No. 767

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANTS

v.

THE CITY OF JERSEY CITY, FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF ON BEHALF OF THE ECONOMIC STABILIZATION DIRECTOR, APPPELLEE

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BRIEF FOR APPELLEE, FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR

OPINIONS BELOW

The opinion of the District Court (R. 194) is unreported. The two reports of the Commission which have been enjoined by the lower court are its reports of June 8, 1943, 255 I. C. C. 649 (R. 248) and November 2, 1943, 256 I. C. C. 507 (R. 272) in I. & S. Docket No. 4394, *Passenger Fares of Hudson & Manhattan R. Co.* Other

Commission reports involved are its decisions in the same proceeding dated July 11, 1938,[1] 227 I. C. C. 741 (R. 286), and August 3, 1943, 256 I. C. C. 269 (R. 313).

JURISDICTION

The final decree of the District Court was entered on January 14, 1944 (R. 218). Petition for appeal was filed February 9, 1944 (R. 220), and was allowed the same day (R. 234). Probable jurisdiction was noted on April 3, 1944 (R. 433). Jurisdiction is conferred by section 5 of the Commerce Court Act, c. 309, 36 Stat. 539, 543, 28 U. S. C., section 45a; section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., section 345, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221, 28 U. S. C., sections 45, 47a.

STATUTES INVOLVED

Pertinent provisions of the statutes involved are set forth in an appendix at the end of this brief.

COUNTER STATEMENT OF THE CASE[2]

The Statement of the Case in the brief of appellant Hudson & Manhattan Railroad Company

[1] Sustained by this Court in *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98.

[2] We have printed a separate Appendix covering relevant portions of the transcript for September 28–29, 1943, relating to (1) restrictions upon scope of reopened hearings, (2) the "War Risk Reserve," and (3) token use,

is deficient in the following respects: (1) It fails to give an adequate historical perspective; (2) it ignores many of the pertinent facts and issues. For these reasons it seems proper to give a more adequate background for the discussion of the legal issues here involved.

The Hudson & Manhattan Railroad Company has been before the Interstate Commerce Commission on three separate occasions seeking rate increases for the sole purpose of obtaining revenue sufficient to meet the interest charges on its bonded indebtedness.

In 1920 the carrier sought to increase its interstate downtown and uptown fares, then 5 and 7 cents respectively, to 8 cents on both lines. The Commission authorized a 6-cent fare on the downtown line and a 10-cent fare on the uptown line (58 I. C. C. 270).

In 1937 the carrier sought to increase the downtown fare from 6 to 10 cents. The Commission found that, in view of existing competition, an 8-cent fare was as much as the traffic would bear (227 I. C. C. 741, R. 286). This order was challenged by the carrier in the courts, and was affirmed by the Supreme Court in 1941 (313 U. S. 98).

On June 27, 1942, the carrier filed a petition in the same proceeding as that initiated in 1937, al-

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including most of the Report of the American Transit Association. References to Transcript between pages 2032 and 2475 will ordinarily be found in the Appendix.

leging that its revenues were still inadequate to meet its interest charges, that an increase in the downtown fare to 10 cents was imperative, that even such increase would still fall short of producing the required revenue, and that the competitive conditions which the Commission found to exist in 1938 no longer existed by reason of wartime conditions, thereby enabling the carrier to increase the fare above the normal competitive ceiling.[3]

Hearings were held in September 1942, when the record was closed. The carrier's operating and financial data were shown only to the end of August 1942. Prior to the entry of the Commission's order, traffic data (number of passengers and amount of passenger revenue) for the months of January and February 1943 were incorporated into the record by stipulation; but the record contains no information as to the carrier's income beyond August 1942.

An appearance was entered on behalf of the Price Administrator in the September proceedings but his representative took no active part in the hearing. After the passage of the Act of October 2, 1942, the Stabilization Director intervened and took an active part in all subsequent stages of the proceeding.

On June 8, 1943, the Commission found that an increase in the downtown fare from 8 to 9 cents was proper during the war emergency pe-

[3] R. 390–403.

riod; that such fare would enable the carrier to earn $2,404,502, somewhat less than its full interest requirements; that while the downtown fare of 10 cents as proposed would yield to respondent substantial additional revenue, with a resulting net income estimated at $2,564,144, or $23,090 more than the full interest requirements, such increase in the downtown fare was not justified because

> * * * we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the interline traffic.[4]

The Commission limited the authorized 9-cent fare to the remaining period of the war and six months thereafter. The Commission also stated:

> It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing. (Order of June 8, 1943, 255 I. C. C. 649.)[5]

[4] R. 270.
[5] R. 248–272.

On July 8, 1943, the carrier filed a petition for modification of the foregoing order, alleging that its fare boxes were incapable of receiving the large number of coins required during rush hours under a 9-cent fare, and requesting that the cash downtown fare be fixed at 10 cents with an alternative token fare on the basis of eleven tokens for a dollar, at the same time offering to apply the token arrangement on its uptown line as well. The carrier represented that in over-all effect this substituted arrangement would not increase the carrier's revenues above those realizable under the June 8 order, but would produce a somewhat less amount.[6]

An order authorizing the substitute token arrangement was issued by the Commission on August 3, 1943 (256 I. C. C. 269).[7] The protestant Jersey City filed a suit in the United States District Court for the District of New Jersey challenging the validity of the August 3 order as having been entered without opportunity for a full and fair hearing of the issues presented therein,[8] whereupon the Commission ordered:

> That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the *propriety and lawfulness* of the modifications made by the Commission in its report

[6] R. 327–345.
[7] R. 313–327.
[8] R. 1–19.

> of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943; * * ** [Italics supplied.]

The reopened hearing was held on September 28–29, 1943, and the testimony therein was strictly limited by the examiner to the issues (1) whether it was feasible for the carrier to collect the 9-cent downtown fare and (2) whether the token arrangement as proposed would in overall effect produce more or less than the revenue realizable under the June 8 order.[10] At the reopened hearing the protestants offered to prove that the carrier, under the existing schedule of fares, was earning what the Commission had estimated the 9-cent fare would yield and that the entire basis for the proposed fare increase was removed by the growth of the carrier's business due to wartime conditions. Such evidence was excluded.[11] The Director then filed a motion to broaden the scope of the reopened hearing so that such evidence might be received. On November 2, 1943, the Commission denied this motion and entered an order authorizing the substituted token arrangement as proposed by the carrier (256 I. C. C. 507).[12]

The protestant Jersey City thereupon filed an amended complaint in the District Court challeng-

[10] R. 351.
[11] Tr. 2035, 2145–2150.
[12] Tr. 2149–2150, 2449–2450.
[13] R. 272–285.

ing the validity of the June 8 and November 2 orders,[13] and the Director by the Price Administrator, intervened in the court proceedings.[14]

Among the grounds for the challenge of said orders were:

(1) The plaintiffs were denied a full and fair hearing in that the Commission refused to receive evidence which, if true, would destroy the basis for any rate increase whatever.

(2) The Commission failed to give proper weight to the government's wartime stabilization policy, under which prices, wages and salaries are sought to be held to the level of September 15, 1942. It was alleged that, since the carrier is profiting greatly by reason of wartime conditions and since its fares are already at the highest level compatible with normal competitive conditions, it would be a violation of the government's stabilization policy and also contrary to sound principles of rate making to authorize a fare increase merely because the carrier's competition is curtailed by wartime restrictions and the carrier could take advantage of such wartime conditions without a disproportionate loss in volume of traffic.

(3) The Commission erroneously assumed that the carrier was entitled to meet its excessive interest charges out of revenues from the railroad operations.

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[13] R. 25–54.

[14] R. 55–66.

(4) The Commission erroneously assumed that an accrual by the carrier of $240,000 a year to its "War Damage Reserve" was properly chargeable to operating expense in computing the allowable return.

(5) The Commission erroneously held that a deficiency in system revenue, even if properly found to exist, might be met by increasing the fare on the downtown line, which has always been the most profitable operation conducted by the carrier, and which under the existing fare has borne far in excess of its allocable share of the total system burden. (In this connection the record was replete with testimony both that the downtown line has produced a large part of the income available for bond interest, [15] and also that the carrier's divisions of joint fares arising out of the interline traffic with Pennsylvania Railroad have been grossly inadequate.)[16]

(6) The Commission erroneously held that an increase in the downtown fare, otherwise found improper, might be justified because of the inadequacy of the carrier's fare collection boxes and by a compensating decrease in the uptown fare.

(7) The Commission erroneously found, on the basis of self-serving opinions expressed by the carrier's officers without factual support,[17] and

[15] Tr. 1177–1182, 1399–1400, 1532, 1994.
[16] Tr. 1053, 1426–1427, 1640–1643, 1923.
[17] Tr. 2071–2073, 2125–2132, 2222–2223.

against all the factual evidence in the case,[18] that the substituted token arrangement would not yield a greater over-all return than the revenues realizable under the June 8 order.

The District Court found it unnecessary to pass upon all the foregoing allegations of error. It found that the Commission failed to give plaintiffs Jersey City and the Stabilization Director a full and fair hearing, and also that the Commission "lightly brushed aside" the national stabilization policy, without giving it the weight and effect to which it is entitled.[19] The challenged orders were permanently enjoined,[20] and the defendants below, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, are prosecuting this appeal.

The following data will, we believe, assist the Court in appraising the issues:

Brief Description of Hudson & Manhattan Railroad

The Hudson & Manhattan Railroad is an underground electric railway providing frequent and speedy service through tunnels under the Hudson River to passengers traveling between Hoboken and Jersey City, New Jersey, and New York City. There are two lines, an uptown line from Hoboken to 33rd Street, New York, and a downtown line

[18] Tr. 2422–2445.
[19] R. 194–201.
[20] R. 218–220.

from Journal Square, Jersey City, through Grove Street and Exchange Place, then under the Hudson River to the Hudson Terminal at Cortlandt Street in lower Manhattan. A tie line connects the uptown and the downtown lines. The total length of all lines is only 8½ miles. The lines are double tracked. There are two parallel tubes under the river for the uptown line and two parallel tubes under the river for the downtown line. The cars have seating capacity for 44 passengers and are somewhat smaller than the New York subway cars. The tunnels are not large enough to accommodate standard size cars. The average length of ride on the downtown line is 2.26 miles; on the uptown town line, 4.24 miles.

The trains are run west of Journal Square to Newark over the line of the Pennsylvania Railroad Company; and there is an intimate interconnection of traffic between the two carriers, with arrangements relating to division of expenses, fares, and other matters of joint interest.

Construction work on the Hudson & Manhattan began prior to 1902. These early attempts resulted in failure and the enterprise went through several reorganizations. The work was finally completed by Hudson Companies, a construction corporation organized in 1905 for that purpose. Operations began on the uptown line in 1908, on the downtown line in 1909. Certain extensions were made in 1910, at which time the system was completed substantially as it now exists.

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In addition to its carrier facilities, Hudson & Manhattan owns two twenty-two story office buildings which it erected over its large underground station at Hudson Terminal.[21]

Cost and Capitalization

In the 1920 rate case the Commission found the original cost of the company properties to be approximately $60,000,000, of which $51,000,000 was allocated to the cost of carrier properties and $9,000,000 to the cost of non-carrier properties.[22]

In 1938 the Commission found the original cost of the railroad properties to be $66,543,281.07.[23]

On January 1, 1913, the Company had outstanding first mortgage 4½-percent bonds in the principal amount of $67,148,000. Under a readjustment plan then formulated, the bondholders were invited to surrender the original bonds and to accept in exchange 5% first lien refunding bonds to the amount of half of the old bonds held by them and 5 percent adjustment income mortgage bonds for the remaining half. Old bonds to the principal amount of $66,204,000 were exchanged on this basis. Interest on the income bonds was to be paid only if earned and did not become cumulative until January 1, 1920.[24] All the bonds will mature in 1957. It was only because of this

[21] 58 I. C. C. 270, 274; 227 I. C. C. 741, 744; R. 286, 290.
[22] 58 I. C. C. 270, 279.
[23] 227 I. C. C. 741, 750; R. 296.
[24] 58 I. C. C. 270, 275.

debt readjustment plan in 1913 that the Company has kept out of bankruptcy since that time, and has been able to continue operations under its unsound capital structure.

In addition to the bonded indebtedness, the Company has outstanding a large amount of common and preferred stocks. In its 1920 opinion the Commission stated that

> Most of the stock was distributed as a bonus with bonds, and a large part of it is now held by the Hudson Companies. No dividends have ever been paid on the stock and respondent states that it is not seeking additional revenue for the purpose of paying dividends on the stock, but only to provide payment of interest on its funded debt.[25]

At the end of 1919 the securities outstanding or about to be issued totaled $124,860,274, of which $79,623,233 was funded debt and $45,237,041 stock. Using a ratio of 83 percent to railroad property and 17 percent to nonrailroad property, the Commission then allocated $67,679,748 of the funded debt and $38,451,485 of the stock to the railroad properties.[26]

In 1938 the Commission allocated the Company's outstanding securities between its railroad and nonrailroad operations on the basis of 83.16 percent to railroad operations and 16.84 percent

[25] 58 I. C. C. 270, 275–276.

[26] 58 I. C. C. 270, 275; 255 I. C. C. 649; R. 252.

to nonrailroad operations. On this basis, $56,108,550.96 of the funded debt was allocated to railroad operations."[27]

At the end of August 1942, the capital securities allocable to the railroad properties on the basis of the 83.16 percent ratio were as follows:

Funded Debt:		
First mortgage 4½% bonds	$783,520	
First lien and refunding 5% bonds	26,572,948	
Adjusted income 5% bonds	23,542,950	
		$50,899,418
Capital Stock		37,557,459
Total Securities Allocable to Railroad Properties		[1] 88,456,877

[1] 255 I. C. C. 649; R. 251.

The aggregate annual interest charges on the above debt amounted at August 31, 1942, to $2,541,053.30. The principal indebtedness is being steadily reduced by the purchase of bonds in the open market.

Payments of Interest and Dividends

The company paid interest on its original 4½% bonds until January 1, 1913, and thereafter on the 5% first lien and refunding bonds issued in readjustment. However, on the income bonds then issued, the company paid an average of less than 1% a year to June 30, 1920 (58 I. C. C. 270). After World War I, the company's affairs took a sharp turn for the better. During the period 1923–1933 inclusive the company paid an aggre-

[27] 227 I. C. C. 741, 745; R. 290.

gate of $2,751,444.73 dividends on the preferred stock, and during the period 1925 to 1932 inclusive the company paid $8,651,051.10 dividends on the common stock—a total of $11,402,495.83. Since dividends could be paid only if there were no interest arrearages on the income bonds, such interest was necessarily paid for the period 1920–1932 inclusive. No dividends were paid prior to 1923; none have been paid since 1933 (255 I. C. C. 649; R. 253). The company's record since then follows:

1933 $302,406 Deficiency in income available for full interest on income bonds.

1934 $279,078 Deficiency in income available for full interest on income bonds.

1935 $487,289 Deficiency in income available for full interest on income bonds.

1936 $394,810 Deficiency in income available for full interest on income bonds.

1937 $655,164 Deficiency in income available for full interest on income bonds.

At the end of 1937 the accumulated deficiency was $1,642,410 (227 I. C. C. 741).

1938 $1,113,350 Deficiency in income available for full interest on income bonds.

1939 $806,048 Deficiency in income available for full interest on income bonds.

1940 $817,424 Deficiency in income available for full interest on income bonds.

1941 $892,148 Deficiency in income available for full interest on income bonds.

Accumulated deficiency as of December 31, 1941, was $5,494,727 (255 I. C. C. 649, R. 251).

1942 The company failed to show what, if any, deficiency resulted in 1942.

1943 Protestants offered to prove that during 1943 the carrier earned full interest requirements on its income bonds (Tr. 2149–2150, 2449–2450).

Fair Value as a Basis for Computation of Just and Reasonable Return

In its 1938 order, the Commission states:

> In behalf of respondent, a civil engineer with many years of experience in tunnel, subway, and other heavy construction, estimated the reproduction cost of respondent's railroad properties new on the basis of 1914 prices less depreciation, at $68,272,998.96. Prices in 1914 were used as representing a fairly stable level for an extended period prior thereto. The details on which this estimate was made are of record and have met with little criticism. The depreciated cost of reproduction new at current prices would be greater than the above estimate at 1914 prices. This estimate is offered in confirmation of the original construction cost of $66,543,281.07 shown by respondent, not only as a prudent investment, but as the actual cost of construction.[28]

In the 1942 hearing the Company's cost figures were extended down to August 31, 1942, at which time the cost of the railroad properties less retirements were shown to be $66,541,352. As the Commission itself states: "The original cost less depreciation does not appear."[29]

The record does not show any segregation of investment as between the uptown and downtown lines. However, in view of the fact that the up-

[28] 227 I. C. C. 741, R. 297.

[29] 255 I. C. C. 649, R. 252.

town line is much longer than the downtown line, and has seven stations in the City of New York, whereas the downtown line has only one station in New York, and in view of the further fact that the tunnels, roadways and equipment of the two lines are in other respects similar, it seems obvious that the investment in the uptown line is considerably larger than that in the downtown line.

Fares

On the uptown line the fare was 5 cents until December 1911, when it was increased to 7 cents; On April 18, 1920, the fare was increased from 7 to 10 cents, where it has since remained. Minimum rides under the 10-cent fare are 1.91 miles; maximum, 5.71 miles; average 4.24 miles.[30]

On the downtown line the fare was 5 cents until April 18, 1920, when it was increased to 6 cents; on July 25, 1938, it was increased from 6 to 8 cents where it has since remained. Minimum rides under the 8-cent fare are 1.25 miles; maximum, 3.2 miles; average 2.26 miles.[31]

Local intrastate fares between stations in New Jersey and between stations on the uptown line in New York are 5 cents. Maximum rides under the 5-cent fare are 2.28 miles in New Jersey, 1.52 miles in New York.[32]

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[30] 58 I. C. C. 271, 276.

[31] 58 I. C. C. 271, 276; 227 I. C. C. 741; R. 249.

[32] 58 I. C. C. 271.

In its 1938 order, the Commission found that, because of competitive conditions, the 8-cent downtown fare had reached the economic limit.[33]

Downtown v. *Uptown Line*

In its 1920 and 1938 rate orders the Commission recognized that the fare on the downtown line should be less than that on the uptown line.[34] The average distance traveled by passengers is 2.26 miles on the downtown line, and 4.24 miles on the uptown line. The running time on the downtown line is 6.4 minutes; on the uptown line, 16.2 minutes. At the 1942 hearing it was shown that the cost per passenger on the downtown line is 5.16 cents; on the uptown line, 9.73 cents.[35] The downtown line carries more than twice as many passengers as the uptown line. The downtown trains, particularly during the four peak hours, are excessively crowded, as many as one hundred or more passengers being carried in cars with a seating capacity of forty-four; while the uptown cars are much less crowded and the passengers suffer much less inconvenience.[36] As above noted, the investment in the uptown line (although no segregation of cost has ever been made) is considerably more than the investment in the downtown line.

[33] 227 I. C. C. 741, R. 310.
[34] 58 I. C. C. 270, 278, 280; 227 I. C. C. 741, R. 302.
[35] Tr. 1994.
[36] Tr. 2076, 2079.

The Company's financial needs have resulted largely from loss of traffic on the uptown line, due to the railroad ferries, the opening of the Holland Tunnel in 1927, the George Washington Bridge in 1931, the Lincoln Tunnel in 1937, and the consequent increase in the competition of busses and private automobiles, which have particularly affected the traffic on the uptown line. The record indicates that the number of busses crossing the Hudson River increased from about 70,000 in 1925 to 1,112,000 in 1937; and that the number of private automobiles crossing the Hudson River increased from about 7,000,000 in 1924 to 25,811,000 in 1937."

In 1941 the downtown line produced net revenue available for bond interest in the amount of $1,707,000, as against an operating deficit on the uptown line.[88] For many years the receipts from the uptown line have yielded little more than out-of-pocket operating expenses. In its 1938 opinion the Commission considered the problem whether the Company would be better off if the uptown line were abandoned. On this point the Commission said:

> Because the fundamental cause of the respondent's lack of income is the decline in traffic, especially on the uptown line, it has made a study to determine whether that line has now reached the point where

[87] 227 I. C. C. 741; R. 294.

[88] Tr. 1994.

it has become a burden upon the road as a whole. Income and expenses, including taxes allocable to railroad operations, were divided between the uptown and downtown lines in 1937 on the basis of a formula of which there has been practically no criticism. The results indicate that in that year the downtown line contributed $1,845,747 and the uptown line $300,592 to net income available for bond interest; that if the uptown line had been abandoned and 50 percent of its traffic lost, and the remainder diverted to the downtown line, the balance available for bonded interest would have been approximately $336,388 less than it was, and if all of its traffic had been lost, the balance available for interest would have been about $817,492 less than the actual. This study indicates, therefore, that respondent would be worse off if the uptown line were eliminated."[39]

At the 1942 hearing, counsel for the carrier insisted that the uptown line had nothing to do with the case, that only the downtown line was involved, and that it was proper to require the downtown line to make up the deficiency in system earnings by a further increase in the downtown fare."[40]

Divisions

Since the outset of its operations, Hudson & Manhattan has had an arrangement with the

[39] 227 I. C. C. 741, R. 295-296.
[40] Tr. 1824, 1937.

Pennsylvania Railroad Company for the joint transportation of passengers between Newark, New Jersey, and New York City, with an agreed division of operating expenses and joint fares. Since September 1, 1923, Pennsylvania has paid Hudson & Manhattan 8.64 cents per passenger transported from New York to Newark on the uptown line, and 7.64 cents per passenger transported to Newark on the downtown line. Pennsylvania owns the right-of-way and trackage between Journal Square and Newark."

There is an intimate interchange of facilities between the two carriers. Pennsylvania has ticket agents and collectors at Hudson & Manhattan's New York stations. The division of joint fares was based on the ratio of mileage over the tracks of Hudson & Manhattan and Pennsylvania, respectively, although, as the Commission points out in its 1938 order, Hudson & Manhattan's investment was about $8,000,000 per mile as compared with a much smaller proportionate investment by Pennsylvania in its Newark line and an average investment of $112,000 per mile by all class I American railroads. Pennsylvania's part of the joint line is above ground while practically all of Hudson & Manhattan's trackage is underground, including its tunnels under the Hudson River. Evidence was presented at the 1937–1938 hearings indicating that

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[1] 58 I. C. C. 270, 276; 227 I. C. C. 741; R. 302–305; R. 261–264.

the cost of terminating or originating a passenger in the Pennsylvania's 33rd Street Station is about 84.8 cents exclusive of the cost of operating the trains, and that Hudson & Manhattan performs a very valuable terminal service for Pennsylvania which justifies a much larger division of the joint fare.[42]

The fare between New York and Newark on the Pennsylvania line varies with the type of ticket from 44 cents for a round trip ticket to 12.4 cents per permissive ride on a 60-trip monthly ticket.[43]

Jersey City and other protestants have long contended that Hudson & Manhattan should have a much larger division of the joint fares. The record indicates that, although Pennsylvania is now receiving a 10 percent increase in its fares between New York and Newark as authorized in Ex Parte 148, none of this increase is being shared by Hudson & Manhattan; and that although Hudson & Manhattan's operating expenses have been greatly increased, its divisions have not increased since 1923; also that the joint traffic does not make its fair contribution toward meeting Hudson & Manhattan's revenue needs.[44]

In allowing the increase in the downtown fares from 6 to 8 cents in 1938 the Commission stated that

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[42] R. 304.

[43] 255 I. C. C. 649; R. 263, 305.

[44] Tr. 1053, 1399, 1426–1427, 1640–1643; R. 270.

> If respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic.[45]

The present record indicates that the carrier has not heeded the foregoing admonition, but has stood resolute in its determination to raise the downtown fare to 10 cents before seeking to obtain any increase in the division from Pennsylvania.[46] In its order of June 8, 1943, the Commission referred again to the divisions problem. After reviewing the testimony at some length, the Commission concluded that the carrier's revenue needs could not be fully met by an increase in its divisions of joint fares, stating:

> If no more than the 10 percent increase as made in the joint fares were reflected in the divisions to respondent, its revenues wou'd be increased by about $150,000 a year. * * * it would seem that under normal circumstances the saturation point in increased fares on that traffic (downtown line) has about been reached. While there can be little doubt that under present conditions a further increase in this fare, even to 10 cents would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the inter-

[45] 227 I. C. C. 741, 762; R. 311.

[46] Tr. 1126, 1270–1273, 2026, 2107, 2111.

line traffic. This view is strengthened by the fact that in August 1942, for example, the interline traffic increased 33.1 percent as compared with an increase of only 9 percent in the downtown local traffic and of 15.9 percent in respondent's total traffic."[47]

Volume of Traffic

The record indicates that Hudson & Manhattan has an annual carrying capacity far in excess of the number of passengers which it has ever carried in any year. It was suggested in the record that the carrier would haul 200,000,000 passengers a year if reasonably distributed throughout the 24-hour day.

During the first year of operation—1908—the Company carried 10,585,000 passengers. This number grew to 58,079,000 in 1912, to 94,102,461 in 1919, to a peak of 113,141,729 in 1927.

Between the years 1927 and 1941 the traffic gradually declined. The total number of passengers in 1937 was 77,989,857 and in 1941, 65,847,289.[48]

Since the outbreak of the war, however, there has been a tremendous increase in the volume of traffic. When Hudson & Manhattan filed its petition on June 27, 1942, seeking to increase its downtown fare to 10 cents, it stated that it could not

[47] 255 I. C. C. 649; R. 264, 270.

[48] Traffic figures are obtained from the Commission's 1920, 1938 and 1943 rate orders.

meet its increased operating expenses and interest requirements under existing fares without a 20 percent increase in traffic over 1941, and that even with a 10-cent fare it would be unable to meet its revenue needs.[49] It then considered that an increase in traffic of 30 percent was out of the question;[50] but before the record was closed and the final order of the Commission issued, the protestants were prepared to show that the traffic had increased by 30 percent and was yielding an income adequate to meet all the financial needs which the carrier had portrayed in its original petition.[51] While the effect of the increased traffic upon its revenue requirements was not allowed to be placed on record, the carrier itself admitted, on the basis of traffic for the first eight months of 1943, that it would carry 83,500,000 passengers during that year—or an increase of about 27% over 1941.[52]

One of the chief considerations in the various proposals for increase in fares of Hudson & Manhattan has been the effect of fare increases upon the volume of traffic. The 1920 fare increases resulted in 11 percent diversion of traffic; the 1938 fare increase resulted in 16.5 percent diversion. Much testimony was heard at the 1942 hearing on

[49] This estimate was based on the assumption that there would be no increase in wages, taxes, or unit costs of materials (R. 399).

[50] Tr. 1196, 1283, 1935–1936, 1949, 2024.

[51] For protestants' offer of proof, see Tr. 2149–2150, 2449–2450.

[52] Tr. 2214.

the diversion which would result from an increase in the downtown fare to 10 cents, estimates ranging from 12 percent to 25 percent or more.[53] However, in view of the war conditions and the greatly accelerated volume of traffic, the carrier's president was of the opinion near the close of the hearings that the threat of diversion is now eliminated by the drastic curtailment of bus and automobile travel, and that substantially no diversion would result under present war conditions.[54]

Reserves To Defray Capital Expenditures

In its 1920 order the Commission stated:

> In 1917, 1918, and 1919 appropriations to a reserve for contingencies of $685,000, $660,000, and $640,000 respectively were made, and the total reserve on December 31, 1919, was $2,375,000, practically all of which had been used for capital expenditures. If these amounts had been applied to interest payments on the income bonds, 2 percent could have been paid in 1917, 2 percent in 1918, and 2½ percent in 1919, and for the full year 1916 .3 percent could have been paid. (58 I. C. C. 270, 279.)

The carrier has been accumulating a similar reserve during the present war under the designation of "War Risk Reserve." Early after the outbreak of the present war, the Company began to accrue $20,000 a month to this reserve, and such

[53] Tr. 1219, 1608–9, 1711, 1921, 1944.

[54] Tr. 1946, 2055, 2135.

accrual has been charged as an operating expense. The record indicates that not one cent has been expended to defray any war damage; that all wages and other items of expenses have been cared for in normal course; and that the accumulations to this Reserve have been used, along with accumulations to the carrier's depreciation reserve, as an amortization fund for purchasing in the open market the company's outstanding and greatly depreciated bonds.[55]

Counsel for Jersey City attempted to show on cross-examination that the Company was purchasing its income bonds in the open market at a price around 28 cents on the dollar, and that in seeking to obtain interest at the rate of 5 percent on par value, the Company is in effect seeking to recover from the ratepayers revenues amounting to more than 15 percent on the market price of these bonds.[56]

Between January 1, 1919, and August 31, 1942, the Company retired $16,780,330 of its funded debt allocable to railroad operations, of which $7,238,000 was retired during the last six years of said period. These bonds were retired at greatly depreciated prices out of funds which the carrier accrued to various reserves under the guise of operating expenses. The President testified that in 1933 he began a vigorous policy of debt retire-

[55] Tr. 1264, 1315–9, 1833–7, 2144, 2151, 2216–8.
[56] Tr. 2222.

ment, which he has pursued to the present date; and he stated that the program of debt reduction since 1933 "has been our salvation".[57]

Carrier's Revenue Needs

In filing its petition and presenting its testimony in this proceeding, the carrier assumed that it was entitled to recover its revenue needs, including not only its operating expenses, but also the full interest on all of its outstanding bonds and the full amount of its so-called "War Risk Reserve," which it characterized as a proper operating expense.

At no time did the carrier undertake to prove that it is reasonable that the passengers should now provide funds for the payment of interest at the rate of 5 percent on more than $50,000,000 of bonds; or the relationship of the amount of these bonds to the present fair value of the railroad property; or the relationship of the interest rate of 5 percent to a reasonable rate of return on the fair value of the property used in the public service; or any other fact tending to show that its claimed revenue needs are just and proper.

The protestants offered testimony indicating that the carrier has not been progressive; that it has failed to take advantage of opportunities to increase its revenues by using its facilities during off-peak hours for freight and express services;

[57] Tr. 1862.

that the Company can best hope to survive by lowering rather than by increasing its fares.[58]

Token Utilization

In connection with the reopened hearing in September 1943 one of the questions presented was whether the carrier's over-all earnings would be increased or decreased, as compared with earnings under the order of June 8, by the alternative token arrangement. Such inquiry was significant in view of the fact that the carrier represented that it was seeking no further increase in revenue, but only a feasible method of realizing the increased earnings anticipated under the June 8 order.

Protestants took the legal position that no increase in fare can be justified merely because the company's old[59] fare boxes are unable during peak hours automatically to count without danger of congestion the numerous coins required in payment of a 9-cent fare; also that an increase in the downtown fare, already at the highest level compatible with the standards of the Interstate Commerce Act according to the Commission's own finding in its order of June 8, could not be justified by a compensating decrease in the uptown fare.

[58] See, for example, testimony of T. W. VanMetre, Professor of Transportation in Columbia University, Tr. 1480–1539.

[59] Installed in March 1918 (Tr. 2232).

But protestants also undertook to meet the carrier with testimony, based on the experience of the entire industry, that the alternative token arrangement would result in increase of the carrier's overall earnings. Such result would necessarily follow if more than 26 percent of the riders should pay the cash fare of 10 cents rather than purchase tokens at 11 for one dollar. On the basis of the only authoritative study on the subject, published by the American Transit Association in 1937,[60] the protestants showed that, because of the small discount offered and the large amount required to be invested in tokens, only about 34 percent of the riders might be expected to use tokens and 66 percent of the riders might be expected to pay the 10-cent cash fare. Telegraphic test check indicated that the experience of the companies using tokens is now substantially the same as it was in 1937.[61] Against evidence to the contrary covering the experience of the entire industry over a long period of years, the Commission accepted as "within the range of probable achievement under the proposed fare basis" the self-serving and unsupported opinion of the Company's officers that 90 percent of all riders would use tokens.[62] This opinion of the management was based on the further opinion

[60] Report of Committee on Fare Structures of American Transit Association, Exhibit F-142 (Appendix to Brief, 47).

[61] Tr. 2431-2434, Ex. F-154.

[62] R. 281-2; Tr. 2072-3, 2158, 2200.

that 100 percent of the regular riders would use tokens, and that only the 10-percent occasional riders would pay the cash fare.[63] The carrier's president further testified that, in estimating a token utilization of 90 percent, he took into consideration "the fare consciousness of Jersey City" and the opinions of witnesses for Jersey City that an increase in the downtown fare from 8 to 9 cents would result in a traffic diversion of 25 percent or more;[64] although he himself testified that in the opinion of the management the fare increase would cause substantially no diversion.[65]

The Commission thereupon authorized the alternative token arrangement, under which the cash fare on the downtown line would become 10 cents—an increase of 66⅔ percent over the cash fare prior to July 25, 1938, and an increase of 25% over the existing cash fare.

QUESTIONS PRESENTED

1. Did the District Court err in holding that the Commission failed to grant to the Director a full and fair hearing on the question whether the 8-cent fare on the Hudson & Manhattan Railroad Company's downtown line should be raised to the alternative-fare basis of 11 tokens for $1.00 or a cash fare of 10 cents?

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[63] Tr. 2073.
[64] Tr. 2162–3.
[65] Tr. 2055.

2. Was the Commission's action in finding the above increased fare just and reasonable under the Interstate Commerce Act arbitrary and unreasonable because unsupported by substantial evidence and, as the District Court held, because taken without due consideration and effect being given to the wartime stabilization policy?

SUMMARY OF ARGUMENT

A

The Economic Stabilization Director, represented by the Price Administrator, was authorized to intervene in the proceedings before the Commission which are subject to review in this case. He acts pursuant to the mandate of Congress to the President in the Stabilization Act of October 2, 1942, to defend the national interest in economic stabilization against the inflationary danger which would result from increases in the level of common carrier and other public utility rates. He asserts no rights or powers superior to the Commission's.

As the District Court below properly held, the Director adequately pursued the administrative remedies given to him and took no position inconsistent with that for which he now contends.

B

The hearing which, after its June 8, 1943, order, the Commission reopened to consider the company's petition for an alternative-fare basis of

11 tokens for a dollar or a 10-cent cash fare was a proceeding to consider not merely a mechanical correction of a prior determination, but an increase in fare above the level previously authorized by the Commission. Hence the Commission's action in narrowing the scope of the reopened hearing to exclude inquiry into the lawfulness and propriety of the rate increase was an arbitrary and unreasonable refusal to grant a full and fair hearing.

The Commission's obligation to grant a full hearing as to the lawfulness and propriety of the higher alternative-fare basis could not be evaded on the theory that, because the higher alternative fare could not be "expected to yield materially better revenue results" to the carrier than the Commission "anticipated at the time of" the June 8th order, it was merely a mechanical correction of the June 8th order. Moreover, the Commission's assumption that the alternative-fare basis would not yield materially higher revenues to the carrier was contrary to the only reliable or probative evidence of record on the use of tokens, despite the Commission's Procrustean effort to stretch that evidence to sustain its erroneous conclusion that the "90–10 percent use ratio * * * appears to us to be within the range of probable achievement under the proposed fare basis."

C

The Commission acted arbitrarily in rejecting the testimony offered by the Director at the reopened hearing, which, by bringing the rapidly changing wartime conditions down to a reasonably proximate period, would have shown that no fare increase was required since, without any fare increase, the company's income had risen to substantially the level which the company had set as its goal when it initiated the proceeding in June 1942, and which the Commission in its June 8th, 1943, order had found necessary to insure adequate transportation service.

The record on which the Commission's order of November 2, 1943, was based contained no accurate data as to the company's income for a period of 14 months prior to the order's effective date. This staleness was especially serious in view of the importance to effective stabilization that determinations as to rate and fare increases be based upon current data.

Furthermore, the importance of a fresh record to the establishment of just and reasonable fares in this proceeding was rendered critical by the special circumstances of the case, namely, that the proceeding was initiated on the basis of changing conditions and revenue needs, and that the Commission's June 8th order not only was based on a calculation of revenues to be obtained under

changed conditions but also declared the Commission's willingness to modify its order whenever a further change of conditions should render the revenue results to the carrier "materially different" from those estimated.

The holding of this Court in *Vinson* v. *Washington Gas Light Co.* does not support the company's contention that the Director had no "standing before the Commission entitling him to tender" evidence of the company's wartime income. Nor is there justification for the company's denial of the relevance of that evidence on the ground that *the Director* had not shown that the existing fare would yield a fair return on fair value, an issue first raised in this appeal.

D

The Commission's orders were unlawful under Sections 1 and 15a (2) of the Interstate Commerce Act, properly construed and applied in the light of wartime economic conditions and governmental controls. Even though the proviso to Section 1 of the Stabilization Act imposes no limitation on the Commission's authority under the Interstate Commerce Act, nevertheless, the Commission was obligated, in applying the standards prescribed by its own Act, to give consideration and effect to wartime conditions and the stabilization program. However, its approach to the problem of thus applying its standards was

vitiated by its erroneous assumption that, because the amount of the fare increase it authorized was small in absolute terms, the effects of its action from the standpoint of stabilization would be negligible.

On the record before the Commission, it could not justifiably conclude that the increased fare which it authorized was "the lowest cost consistent with the furnishing" of "adequate and efficient transportation service" or that it was necessary to meet "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." Indeed, an analysis of the Commission's own estimates of the effect of the increase showed that the company was in no need of the increase, especially in view of its creation of a "War Risk Reserve" and its persistent failure to seek more equitable divisions of joint fares.

Evaluated from the standpoint of its impact on investors and users, the Commission's action in increasing the fares on the downtown line was unwarranted and inconsistent with the national stabilization policy. Investors in the company's securities were amply rewarded by the return yielded in wartime by the 8-cent fare. On the other hand, the users of the downtown line, always the profitable portion of the company's system, were being called upon to sustain the second increase in fares in six years, raising the level of

fares by more than 50 percent despite the fact that during approximately the same period the index of streetcar and bus fares for the nation was almost stationary.

This Court, examining the problem as a question not merely of the review of administrative action but of the effectuation of complementary Congressional policies, should affirm the decision of the District Court restraining the increase as unjust and unreasonable.

ARGUMENT

A. THE ECONOMIC STABILIZATION DIRECTOR WAS LEGALLY AUTHORIZED TO INTERVENE, IN DEFENSE OF A LEGALLY RECOGNIZED INTEREST, TO CHALLENGE THE COMMISSION'S ORDER AND WAS SUBJECT TO NO PROCEDURAL DISABILITIES IN SO DOING

1. *The Director, having been designated by the President pursuant to Section 1 of the Stabilization Act, is charged with the duty of intervening in rate increase proceedings to protest increases where, as here, the increase is contrary to the interests of the wartime stabilization program*

The Director's participation in the present proceeding was under the notice and intervention provision of the Act of October 2. He intervened through the Price Administrator, the Director's designated representative, for the purpose of opposing increases in fares believed to be contrary to both the Interstate Commerce Act and the national program to keep down the cost of living. In the words of Congressman Wolcott, his inter-

vention under the Act was pursuant to the Congressional purpose of "allowing the Price Administrator, or anyone else who the President designates, to intervene to protect the public interest * * *"[∞]

The substantial character of his interest in utility and common carrier rates is indicated by the fact that the total annual payments for utility and common carrier services exceed $12 billion.

The level of transportation rates and other utility charges is, of course, a factor of consequence in the cost of military and naval supplies and the cost of war operations.

Many of the charges imposed affect the cost of living directly, as in the case of electric light rates and passenger fares and freight charges which comprise a part of the net cost of goods to which retailers add their margins. Still other of these charges constitute costs of manufacturing and distribution, increases in which, when combined with other cost increases, make for other pressures against price ceilings. Perhaps no form of rate increase, however, is of greater concern to the Director than increases in the fares charged for local transportation. Not only is the increase in the cost of living direct, but it is with reference to an expenditure as to which the public is peculiarly sensitive, as the long history

[∞] 88 Cong. Rec. p. 7740.

of municipal political strife on transit issues demonstrates.

Here the proposed increase directly affects the cost of living of thousands of war workers. This fact was called to the Commission's attention as early as December 14, 1942, in our brief filed with the Examiner, where it was stated:

> In a vital defense area such as the New York-New Jersey area served by petitioner, where millions of defense workers are employed, adequate commutation facilities must be provided. And they must be made available at reasonable fares. Otherwise the cost of living of such workers will increase and may occasion demands for increases in wages and salaries. Thus is the spiral commenced which leads ultimately to disastrous inflation. That the proposed increased fare would result in a considerable increase in the cost of living of the commuting passengers has already been found by the Commission (227 I. C. C. 757–758).

In intervening in proceedings of this character, the Director's intervention has not been for the purpose of seeking "superior rights and powers" [67] to that of the Interstate Commerce Commission. Nor has it been for the purpose of "paralyzing or extinguishing local institutions." [68]

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[67] *Cf. Vinson* v. *Washington Gas Light Co.*, — U. S. —, 64 S. Ct. 731 (1944).

[68] *Cf. Davies Warehouse Co.* v. *Bowles*, — U. S. —, 88 L. Ed. 379, 64 S. Ct. 474 (1944).

On the contrary his participation in common carrier and utility rate proceedings has been generally recognized as advantageous by regulatory commissions. Moreover, particularly in matters before the Interstate Commerce Commission, his entry or continued participation has been at the request of state commissions and municipalities in a number of cases.[69]

The Court should also note that under the Commission's procedure a very substantial burden

[69] Some of the proceedings in which the entry or continued participation of the Director or the Price Administrator has been upon the formal or informal request of state commissions or municipalities are the following:

Before the Interstate Commerce Commission: Case No. 28963, Alabama Intrastate Fares (Alabama Public Service Commission); Finance Docket 14257, Southern Railway Co. Abandonment of Attalla-Rome Line (Alabama Public Service Commission); Chicago Commutation Fare Cases (Illinois Commerce Commission); Case No. 29000, Kentucky Intrastate Fares (Kentucky Commission); Fares of Hudson & Manhattan Railroad Co. (City of Jersey City); New York Commutation Fare Case (New York Public Service Commission); Case No. 29036, North Carolina Intrastate Coach Fares (North Carolina Commission); Case No. 29037, Tennessee Intrastate Fares (Tennessee Commission).

Before State Commissions: *Illinois*—Chicago Rapid Transit Company, No. 29923 (City of Chicago); Illinois Central Telephone Company (City and Town of Washington, Illinois); Illinois Allied Telephone Company (City of Princeton, Illinois); Chicago Surface Lines (City of Chicago, Illinois); *Indiana*—Eastern Indiana Gas Company (City of Nashville, Indiana); *Michigan*—Detroit Edison Company (City of Detroit, Michigan); *Ohio*—East Ohio Gas Company (City of Cleveland, Ohio); Ohio Fuel Gas Company (Village of Malta, Ohio); *Pennsylvania*—Longacre Park Heating Company (Borough of Yeadon, Pennsylvania).

must be assumed by the Administrator for protection of the public interest. It is not the Commission's practice to suspend new rates in the absence of protest by a party. In many cases involving substantial increases in passenger and freight rates the Administrator is the only party protestant, a situation which is natural under wartime conditions when private litigants and public officials lack time to devote to the protection of their individual and community interests. Where the Commission suspends following the filing of the protest, the entire burden at the hearing of making out an adequate case in opposition to a request of the carrier for increases therefore falls upon the protestants. The Commission's own legal and technical staff, unlike that of the Federal Power Commission, does not actively participate on behalf of the public. Hence, the task of breaking down the case for an increase through cross examination and affirmative testimony is placed upon the Director and other agencies representing the public interest.

2. *The Court properly held the Director exhausted his administrative remedy*

The Company argues that this suit was prematurely filed on the theory that the Director's administrative remedies have not been exhausted. We submit there is no merit in this contention.

The Director in his answer of July 19, 1943,

to the July 8, 1943, request of the Railroad for the right to sell tokens in lieu of the 9-cent cash fare specifically requested the Commission to reconsider its order of June 8th. In this answer the Director stated:

> In view of Petitioner's tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order, and return Petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living.

The New Jersey protestants asked that the June 8 order be indefinitely suspended and the proceeding be set for further hearing (R. 350).

The Director's counsel at the reopened hearings stated that they opposed any increase over and above the 8-cent cash fare. In his petition for modification dated October 14, 1943, the Director specifically stated that the order of June 8, 1943, was contrary to the Stabilization Act (R. 67). The Commission in its order of November 2 declined to permit the introduction of evidence which would have brought the record down to date. It again reaffirmed its former findings. It mistakenly held that the new evidence, if available, would not change its earlier findings (R. 275).

These requests of the Director constituted a request for rehearing of the June 8 order. More-

over the Commission in its November 2 order permitted the Railroad to file and make effective the new tariffs on 15 days' notice (R. 284). With the filing of the tariffs the Commission took the view that it was without legal power to further suspend the tariffs. The tariffs could only be suspended by action of the Company. Further recourse to the Commission would have been useless.

The court below properly noted that no request for a rehearing is required under the Commission statutes or decisions of this Court, particularly *Baltimore and Ohio R. R.* v. *United States,* 298 U. S. 349, where the Court held:

> No act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the Commission for rehearing, repeal, or modification. Nor has Congress attempted to limit the time within which the carrier may sue to enjoin enforcement of an order of the Commission prescribing rates or divisions (p. 371).

3. *"Estoppel" cannot be invoked against the Director as a reason against injunction proceedings or to justify the Commission's refusal to receive evidence designed to show that the carrier was entitled to no increase over its present 8-cent fare*

Only the carrier in its brief, and not the Commission, has invoked the argument of "estoppel." While denying the validity of such "estoppel"

argument against Jersey City, we submit that it is totally inapplicable to the Director, who was in no way precluded by any direct or indirect action on his part from contesting any increase over the present 8-cent fare. Throughout the proceedings the Commission and carrier were apprised of the Director's opposition to such increase and were not misled or placed in doubt as to his position.

These protests were made:

1. In the Director's original brief filed with the Commission.

2. In his exceptions to the Examiner's proposed report wherein the Director excepted to any increase over the 8-cent fare.

3. In the Director's oral argument before the Commission on April 20, 1943 (Tr. 2009 et seq.), wherein his counsel stated that a fair and reasonable rate for the carrier is 8 cents.

4. In his reply of July 19, 1943, to the carrier's petition for reconsideration and modification of the Commission's order of June 8, 1943, and for a token fare structure, wherein he said:

> And in view of Petitioner's (carrier's) tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order (that is, its order of July 11, 1938), and return Petitioner's downtown fares to the original level of 8¢. This will serve the national program to keep down the cost of living.

5. As shown by his attempts to introduce evidence at the reopened hearings of September 28–29, 1943, as to the unwarranted nature of any increase over the 8-cent level (Tr. 2035, 2145, 2149, 2449).

6. In his brief filed October 14, 1943, in connection with the Commission's hearing of September 28–29, 1943, wherein *inter alia*, the inflationary nature of any increase over 8 cents was argued.

Certainly neither the Commission nor the carrier could under these circumstances reasonably be in doubt about the position of the Director. Nor is any weight to be given to the carrier's farfetched argument that perhaps an "estoppel" against Jersey City, based on the limited allegations in its original complaint, can be extended to the Director "by reason of his acceptance of the opportunity offered him by the Commission to participate in the further hearing" of September 28–29, 1943 (Carrier's brief p. 75). It is obvious that the Director, not being a party to the original complaint, could not be estopped by any action purportedly resulting from its allegations, especially in view of the fact, as noted above, that at the hearings of September 28–29, 1943, he made his opposition to any increase above 8 cents abundantly clear.

B. THE REOPENED HEARING TO CONSIDER THE COMPANY'S PETITION FOR AN ALTERNATIVE-FARE BASIS OF 11 TOKENS FOR A DOLLAR OR A 10-CENT CASH FARE WAS A PROCEEDING TO CONSIDER NOT A MERE MECHANICAL CORRECTION OF A PRIOR DETERMINATION, BUT AN INCREASE IN FARE ABOVE THE LEVEL PREVIOUSLY AUTHORIZED BY THE COMMISSION. HENCE THE COMMISSION'S ACTION IN NARROWING THE SCOPE OF THE REOPENED HEARING TO EXCLUDE INQUIRY INTO THE LAWFULNESS AND PROPRIETY OF THE FARE INCREASE WAS AN ARBITRARY AND UNREASONABLE REFUSAL TO GRANT A FULL AND FAIR HEARING

1. ***The Commission's obligation to grant a full hearing as to the lawfulness and propriety of the higher alternative-fare basis could not be evaded on the theory that, because the higher alternative-fare could not be "expected to yield materially better revenue results" to the carrier than the Commission "anticipated at the time of" the June 8th order, it was merely a mechanical correction of the June 8th order***

After the Commission's order of June 8, 1943, was changed by its August 3rd order so as to authorize the alternative-fare basis of 11 tokens for $1 or a 10-cent cash fare, Jersey City sued for an injunction because of the Commission's failure to grant a hearing to consider this further fare increase (euphemiously termed a "modification").[70] The Commission thereupon reopened the proceeding by an order expressed in the following terms:

> That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the pro-

[70] R. 1.

priety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; * * *."[11]

Although the order was susceptible of a construction which would have allowed a full inquiry into the "propriety and lawfulness" of the alternative-fare basis, the Commission's examiner restricted the inquiry to an inquest on what the higher fare would extract from the patrons of the downtown line as against what the lower fare would give to patrons of the uptown line."[12]

The reasoning of the Commission underlying its refusal to permit a full hearing with respect to the proposed alternative-fare basis seems to have been about as follows: (1) The 9-cent fare approved as just and reasonable in our June 8th report was calculated to produce revenue sufficient to meet the carrier's needs. (2) The 9-cent fare appears not practicable of collection. (3) The alternative-fare basis will yield approximately the same amount of revenue as we found the carrier needed in our June 8th report. (4) *Therefore,* without further hearing, we are now entitled to find the alternative fare to be just and reasonable.

The fourth link in this chain of reasoning is a clear *non sequitur.* A fare which produces

[11] R. 351.

[12] R. 2034–5. The 9-cent fare's practicability was also considered.

the same revenue as another fare which is just and reasonable is not by virtue of that fact itself just and reasonable. Indeed, it may produce the same revenue simply because it is *un*just and *un*reasonable, as where a sharply increased rate causes so much diversion of traffic as to produce no more revenue than a much lower antecedent rate. And here, where the assumed similarity in revenue is achieved by offsetting the increase of one fare by a reduction in another fare *on another line*, it is, of course, obvious that the increased fare must be separately justified. It is not enough to tell the users of the line where the fare has been increased that the users of the other line are enjoying lower fares as a consequence.

Once it had become apparent that a new fare must be established in lieu of the impracticable 9-cent fare, a range of possibilities was opened to the Commission. The alternative-fare basis proposed by the Company and adopted by the Commission was only one of these. Another alternative would be to return to the 8-cent fare. In between would be a number of combinations of token offers with a 9-cent or a 10-cent cash fare.

Obviously, in view of the nature of the original proceedings, an essential factor in deciding among these alternatives was the net revenue which each would yield under the then existing conditions, a factor distinct from the revenue which the Com-

mission had found in a previous hearing the impracticable fare would have yielded—if it had not been impracticable—under conditions which no longer existed.

The Commission failed to carry out its obligation to consider these other alternatives by making three arbitrary and unreasonable determinations:

(i) It grossly underestimated the amount of the fare increase the alternative fare basis imposed on the patrons of the downtown line by a flagrant disregard of the only reliable evidence of record. This error is discussed in point 2 below.

(ii) The Commission rejected evidence offered by the Director that the 8-cent fare was actually then yielding what the Commission had already found would be sufficient to meet the carrier's reasonable revenue needs. Hence the Commission's finding that the alternative-fare basis it approved was "the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings" in the June 8th report was not based on a hearing of the relevant available facts. This error will be developed further under heading C of our brief.

(iii) Without further evidence on the point, it disregarded its prior determinations that 10 cents was a reasonable maximum fare for the uptown

line and that a lower fare should be maintained on the downtown line in view of the differences in costs and service. Instead the Commission equalized the two fares on the alternative-fare basis by reducing the fare on the relatively unprofitable uptown line and increasing still further the fares on the profitable downtown line. This error will be developed further under heading D.

2. *Moreover, the Commission's assumption that the alternative-fare basis would not yield materially higher revenues to the carrier was contrary to the only reliable or probative evidence of record on the use of tokens, despite the Commission's Procrustean effort to stretch that evidence to sustain its erroneous conclusion that a "90–10 percent use ratio * * * appears to us to be within the range of probable achievement under the proposed fare basis"*

In its August 3rd order the Commission, without any independent investigation, accepted without qualification the affidavit of the company's president, Mr. Brown, that the proposed token fare structure of 11 tokens for one dollar or 10-cent cash fare in the alternative, would result in a 90% purchase of tokens.[73] As we shall establish, the Commission thus prejudged a matter of vital importance affecting the determination of the question whether a substantial portion of the downtown riders would pay a 10-cent cash fare, instead of an 8-cent or 9-cent cash fare. In so

[73] R. 322.

doing, the Commission disregarded, among other matters, its plain obligation of placing the burden of proof upon the carrier to establish the reasonableness of the proposed increased fare.

When the hearings were reopened in September, the company engaged in a feeble and unsuccessful effort to buttress the Commission's conclusion.[74] But even here the burden of proof was placed not upon the carrier but rather upon the protestants to overcome the Commission's prejudgment of the issue.

The only evidence presented by the company on the point was the unsupported statement of its president, who had had no prior experience in the development of token fare or fare structure. He stated that in his opinion, 90% of the users would buy 11 tokens for $1 rather than pay a 10-cent cash fare. No studies of any kind were made or produced by the company, as the excerpts from cross-examination below clearly reveal[75] and the company's president admitted

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[74] Tr. 2072–3, 2158, 2162–3, 2200.

[75] Testimony of Walter F. Brown, President, Hudson & Manhattan R. R. Co. (Tr. 2125):

"By Mr. Booth:

"Q. And did you have a written report submitted to you on this question prior to July?

"A. A written report?

"Q. Yes, sir.

"A. Well, I don't remember any written report.

* * * * *

"Q. Did you consult the Interstate Commerce Commission before you prepared this affidavit?

never having seen the A. T. A.'s authoritative published study on the subject. No effort was made to obtain the views of its passengers upon this point, and, as we shall demonstrate, in arriving

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"A. Well, I don't know just what you mean by that.

"Q. Well, does the Interstate Commerce Commission have any local transportation experts or people who might be experts in the development of token fare structures?

"A. Why, I did not ask any advice from them.

"Q. You did not?

"A. No.

* * * * *

"Q. And now may I direct your attention to this volume which I hold in my hand, which is headed, 'American Transit Association, Affiliated Organizations, Proceedings, 1937.' Have you seen this volume?

"A. No; I have never seen it.

"Q. Have any of the men called your attention to it, with whom you became or were associated in connection with this problem?

"A. No; I do not believe I ever heard of it.

"Q. All right. Did you examine this report? I refer you specifically to page 928 of the 1937 proceedings, the Report of the Committee on Fare Structures, and ask you whether you read that report?

"A. I told you I have never seen the book.

"Q. Well, it might be that you have seen this report, Mr. Brown.

"A. No; I have never seen the report.

"Q. You have never seen the Report of the Committee on Fare Structures for 1937 of the American Transit Association?

"A. Well, I don't think so."

Testimony of John C. Van Gieson, General Superintendent, Hudson & Manhattan R. R. Co. (Tr. 1806):

"Q. Now, your patrons are people that generally live in the metropolitan district and use you pretty regularly; isn't that right?

at this estimate as well as the proposed token fare structure, the company disregarded completely the experience of the transit industry in dealing with token fare structures. The record clearly indicates that the 90 percent figure was

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"A. That is right.

"Q. Now, couldn't you take care of those people to their convenience and to your convenience by selling them tokens enough to last them for a week, even at the eight-cent fare, tokens representing eight cents apiece?

"A. Well, that might sound all right to you, Mr. Bauman. It would seem on its face to be a time-saver, but I think that there is a bit of fallacy in that."

Testimony of John J. Fritsch, Comptroller, Hudson & Manhattan R. R. Co. (Tr. 2222–2223):

By Mr. Booth:

"Q. Mr. Fritsch, where did you get this 90-percent figure that constitutes the basis for your exhibits 147 to 150?

"A. That is the basis that was given to me in order that I might prepare these figures.

"Q. Who gave it to you, Mr. Brown?

"A. It was arrived at at a conference with Mr. Brown and the attorneys.

"Q. Who participated in this conference, the attorneys and Mr. Brown?

"A. That is all that I know of.

"Q. Mr. Finerty?

"A. No.

"Q. Mr. Buck?

"A. Mr. Buck.

"Q. You had nothing to do with the estimate of 90 percent yourself?

"A. No.

"Q. You are not sponsoring that 90 percent figure?

"A. No.

"Q. And you have never participated in the preparation of any fare or token structure in the course of your experience in your career?

"A. No."

pulled from the air for the purpose of enabling the company to obtain its 10-cent cash fare.

While the company, on which the burden rested, presented no probative evidence on this important issue, nevertheless, the Director went forward with concrete and authoritative evidence. Through an expert witness, the Chief of the Local Transportation Section of the Office of Price Administration, a trained engineer and statistician, he produced concrete and authoritative studies made on the token fare problem. This testimony included Exhibit F–142, a study of token fare structure made by the American Transit Association, and a recent check made of various transit companies to determine the accuracy of the American Transit Association study. The evidence[76] revealed the following:

(1) That a token fare structure requiring an investment of a dollar with a differential of only

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[76] Tr. 2424–2444. In Appendix B to its brief, the Commission presents what purports to be a summary of all the evidence in the record. That caution is requisite in its use is indicated by its summary of the evidence dealing with token utilization. Thus, on p. 75 appears the following statement:

> Witness Kosh, for the O. P. A., testified that in 1929 and 1930, 85 percent of the people using buses in Cincinnati purchased tokens (p. 2438).

That is what the witness stated, but he was not talking of token use on the basis here proposed but of token use at a 10-cent cash fare and *3 tokens for 25 cents*. And he also stated that when the token fare was changed to 5 tokens for 45 cents, use dropped to 60%. If the Commission had

10% between the cash and the token fare would normally indicate 33% instead of 90% utilization of tokens.

(2) That no transit company in the nation is currently maintaining a token fare structure similar or substantially similar to the token fare structure suggested by the company.

(3) That the purchase of token fares depends almost entirely upon the amount of the initial cash outlay required and the difference between the cash and the token fare."

(4) That in Chicago, where a dollar outlay was required for tokens, only a 6% utilization was indicated.

(5) That a current check made by telegram of 10 companies demonstrated the substantial accuracy of the American Transit Association study.

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summarized what the witness said about token use on the basis here proposed, the ratio would have been in the neighborhood of 35 to 45%. On p. 76 the following is found:

> Witness Kosh would express no opinion on the percentage of token passengers, 11 for $1.00 (p. 2459).

That statement misleadingly suggests that there was no evidence that token utilization would be other than claimed by the company, i. e. 90%. The reverse is true. What Witness Kosh would not say was what the *exact* token utilization would be under three different fare combinations, 10 tokens for 90 cents, 11 for 90 cents, and 11 for 99 cents.

" *State of Minnesota* v. *St. Paul City Railway Company*, 7 P. U. R. (N. S.) 174 and *Fed. of Citizens' Assns.* v. *Cap. Tran. Co.*, 47 P. U. R. (N. S.) 187 (1943).

The findings by the Commission in connection with the study were contrary to all the evidence in the record. These findings were:

> * * * there is no indication that the traffic characteristics of any of the companies are similar to those on the lines of respondent, particularly with respect to the volume of traffic and the concentration thereof in peak periods at particular stations, such as at Hudson Terminal. (R. 281.)

The only evidence in the record shows that peak traffic characteristics for the test companies are similar to those of the Hudson & Manhattan Railroad (Tr. 2468–9). There is also uncontradicted evidence in the record that Exhibit F–142 is applicable to the company (Tr. 2461, 2466–7). It is also noteworthy that when appellees asked for a short time to perfect this study on the very points here objected to by the Commission (Tr. 2462), such request was denied. In general, there was no evidence of the study's inapplicability, but there was clear evidence of its applicability. Indeed, the Commission does not take its own objection to applicability very seriously, using Exhibit F–142 to draw its own conclusion as to a reasonable token utilization (R. 279–281).

The Commission's analysis of Exhibit F–142, with its conclusion that a 90% token utilization is probable, is based on errors in elementary statistics so obvious and so demonstrable as to require

the rejection of the conclusion as being without any foundation in the record.

The Commission, in its last order, attempted to justify its adoption of the company's guess that at the proposed fare the token utilization would be 90%. If the interpretation of Exhibit F–142 were a matter of judgment, with room for difference of opinion, then the Commission's conclusion would have to be accepted as beyond judicial review. However, in its analysis of the exhibit, leading to a finding that a reasonable utilization would be 79.46%, the Commission made a few fundamental errors in elementary statistics.[78] These brook no

[78] 1. The Commission finds the maximum deviation in actual token utilization, as between two companies using the same combination of fares. This deviation in *actual* utilization is added to the *estimated* utilization for the particular fares in question. This addition of two unlike quantities is a fundamental error in elementary statistics.

2. To this illegitimate hybrid of two unlike quantities, is added a second deviation, this time the maximum deviation between the predicted value (as per Exhibit F–142) and the extreme actual utilization as shown in the telegraphic spot check. This addition of a second deviation is absolutely erroneous; a deviation indicates the probable discrepancy between the estimated figure, and the true figure. The addition of two deviations is utterly meaningless.

Had the Commission noted the explanatory material that was part of Exhibit F–142, it would there have found, specifically stated, the statements of reliability of the estimates made. It was there explicitly stated that the 33.76% estimated figure could be expected to hold within 4.2 percentage points, up or down, in 99 out of 100 cases; that it would be expected to hold within 2.8 percentage points in 95 cases out of 100; and that it could be expected to hold within 1.4 per-

argument and allow no difference of opinion. They vitiate its conclusion as to token utilization.

The Commission also erred in stating in its order (R. 281–282)—

> * * * it is likely that the traffic characteristics of the lines of respondent differ greatly from those on the lines of the other companies referred to of record, *and therefore* the 90–10 percent ratio urged by respondent appears to us to be within the range of probable achievement under the proposed fare basis. [Italics supplied.]

Firstly, the above finding is clearly without any foundation in the record. In fact, as shown above, the Commission complains that there is nothing in the record to demonstrate the similarity of characteristics. That, as we have shown, is not true. There certainly is no evidence that conditions are different, if certain innuendos by the company's counsel are disregarded. Hence, the finding of the likelihood of the difference in traffic characteristics is entirely without support in the record.

However, a still more flagrant error appears in the above quotation. Even if it be assumed, *arguendo*, that it *is* likely that these characteristics are different, does it *"therefore"* follow that, of every possible token utilization, the 90–10 use

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centage points in 68 cases out of 100. These limits are estimates of reliability that any trained statistician would derive from an independent analysis of the basic data in the study.

ratio is correct or even probable? The Commission assumed its August 3rd prejudgment of the validity of the 90% utilization to be correct, and Appellees were told, in effect: "Disprove that ratio; otherwise we'll adopt it, of all possible choices, as correct." This was an error in law as well as in reasoning and in fact.

C. THE COMMISSION ACTED ARBITRARILY IN REJECTING THE TESTIMONY OFFERED BY THE DIRECTOR WHICH, BY BRINGING THE RAPIDLY CHANGING WARTIME CONDITIONS DOWN TO A REASONABLY PROXIMATE PERIOD, WOULD HAVE SHOWN THAT NO FARE INCREASE WAS REQUIRED SINCE, WITHOUT ANY FARE INCREASE, THE COMPANY'S INCOME HAD RISEN TO SUBSTANTIALLY THE LEVEL WHICH THE COMPANY HAD SET AS ITS GOAL WHEN IT INITIATED THE PROCEEDING IN JUNE 1942, AND WHICH THE COMMISSION IN ITS JUNE 8, 1943, ORDER HAD FOUND NECESSARY TO INSURE ADEQUATE TRANSPORTATION SERVICE.

1. *The record on which the Commission's order of November 2, 1943, was based was stale, especially in view of the importance to effective stabilization that determinations as to rate and fare increases be based upon current data*

The Commission's order of November 2, 1943, which, together with the order of June 8, increased the fare on the downtown line from 8 cents to the alternative fare basis of 11 tokens for $1 or 10 cents cash, was based on a record containing no accurate data as to the company's income *for a period of 14 months prior to the order's effective date.* The record on which the June 8 order was based was closed September 19, 1942. It contained evidence of the Company's

operations no later than August 1942. To this was added, at the April 1943, oral argument, a one-page stipulation showing the road's total (but not net) revenues and passengers for January and February 1943. Finally, in the September 1943 hearing evidence was admitted which bore on the use of tokens.

The Commission does not seem to have appreciated how stale it had allowed the record to become, for in its November 2 order it erroneously assumed that it had had complete financial data for the entire year 1942."

An established principle governing the administrative regulation of common carrier and other utility rates is that, where conditions have materially changed since the holding of a hearing to establish such rates, a refusal to reopen the hearing to receive evidence bearing upon the changed conditions, is an "action not within the permitted range of the Commission's discretion," but "a denial of a right." *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248; see also *Baltimore & Ohio R. R. Co.* v. *United States,* 298 U. S. 349, 389.

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[79] "At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, *the traffic and revenue results on the lines of respondent for the year 1942* and the traffic results for January and February 1943, the latest periods for which any such results were then available were by agreement of the parties made a part of the record" (R. 275). [Italics supplied.]

True, this Court has recognized that for the orderly administration of the functions of rate-making agencies, records may not be kept open indefinitely. The question, of course, is whether the Commission has acted arbitrarily and unreasonably in the light of the circumstances of the particular case. If precedents are to be invoked, they must be used with discrimination, and, in particular, peacetime precedents are to be distrusted.[*] Recognition, must be accorded, in the

[*] Apart from the significance of the change to wartime conditions, it is submitted that the following cases relied upon by appellants, are not in point:

United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 494, wherein the Court held that the Commission is not required to grant rehearing in every rate case for changed economic conditions, however insignificant the effect on carrier revenue; that the carriers should not be allowed to sit by, take their chances on a favorable decision, and then reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted.

Acker v. *United States*, 298 U. S. 426, 433, wherein the Court found that the petitioners had full opportunity to produce all pertinent evidence before the record was closed, and that it was "inconceivable that economic conditions had so altered in this brief period as to demonstrate that the new schedule of rates, if just when promulgated, had become unjust and oppressive."

In the two foregoing cases the carriers were attacking rate orders though they had failed to produce at the hearing evidence within their peculiar power and province to produce. In the instant case, Hudson & Manhattan refused in September 1943 to produce any evidence as to its operating income and revenue needs beyond August 31, 1942, despite—or rather because of—the fact that its income had been experiencing an increase which negatived all revenue needs.

instant case, to the special wartime responsibilities devolving upon the Commission by reason of its place in the stabilization program.

If the Commission is to play the role which the Congress has reserved for it, it cannot base decisions directly increasing the cost of living on records over a year old. The wartime economy is a dynamic one; conditions alter rapidly; new demands for service arise overnight; occasionally cost increases strike with equal celerity. To recognize these facts is not to demand the administratively impracticable or to require rates to fluctuate from month to month. It is enough here to condemn a refusal to consider the drastic changes wrought by 14 months of total war on a carrier providing commuting service to the public in a vital defense area.

The record was replete with evidence of the effect upon the carrier's revenues of private automobile traffic. War laid a drastic hand on that traffic. The restrictions which were first imposed in 1942 became more severe as 1943 wore on.[8]

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[8] Thus, on May 20, 1943, Supplement No. 2 to OPA Order 5C, 8 F. R. 6687, was issued effective the same date, designating the North Atlantic Coastal area, including New York and New Jersey, as a "critical gasoline shortage area" and prohibiting the use of automobiles for pleasure and non-essential travel.

On March 20, 1943, Amendment 37 to rationing Order 5C, 8 F. R. 3616, was issued effective until November 8, 1943, reducing the allotment on Class A from 3 to 1½ gallons in the critical gasoline shortage area, including New York and

The immediate beneficiary of these wartime restrictions was the Hudson & Manhattan. Indeed, its petition for fare increase filed on June 27, 1942, was founded on the frank declaration that its normal competition was abated by wartime restrictions on automotive transportation, and that its volume of traffic had so increased due to wartime conditions that it could raise its fares above the level which the Commission found in 1938 to be its maximum ceiling under normal competitive conditions (R. 394, 398).

Ready as the carrier was to use this change to its advantage, it was equally ready to oppose with the Commission any inquiry to determine whether the change had progressed to the point where the company could no longer show a need for increased fares.[22]

The Commission was, of course, well aware of the trend to which it resolutely shut its eyes when the Director came before it with evidence showing where the trend had carried the Hudson & Manhattan's revenues. Back in December 1941, at

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New Jersey. (This allotment has since been increased to 2 gallons.)

On June 1, 1943, Amendment 5 to Supplement 1 of OPA Order 5C, 8 F. R. 7391, was issued effective June 2, 1943, reducing B and C coupons issued to those engaged in preferred occupations from 5 gallons to 2½ gallons per week in the "critical shortage area" including New York and New Jersey. This reduction, sharply restricting the worker who had been commuting by auto, was, of course, of special significance from the standpoint of the Hudson & Manhattan.

[22] Tr. 2149–50, 2198–9, 2215, 2218–9, 2228, 2446–50.

the beginning of the war, in *Ex Parte* 148, all the Class 1 railroads joined in demanding a 10% increase in freight and passenger rates in order to meet the higher wage and price levels which had resulted from our war effort. Certain increases were authorized as necessary to enable the carriers to function efficiently in wartime.[83] A year later, upon insistence of the Office of Price Administration, the Commission reviewed the situation. It was found that passenger revenues had increased 99.8% within a year, that increased traffic had far more than outweighed all increases in operating expenses, and that the railroads were beginning to enjoy unprecedented prosperity. In April 1943 the Commission rescinded the increases in freight rates which it had authorized the year before. And while it allowed the 10% increase in passenger fares to stand, largely as a deterrent against an excessive volume of traffic, it is especially noteworthy that, two months before its June 8 order increasing the fares of Hudson & Manhattan, *the Commission rescinded that increase as to commutation fares.*[84]

In preparation for the reopening of the hearing, the Director was faced with the problem of showing the earnings attributable to the carrier operations of the company, which owns two large

[83] *Increased Railway Rates, Fares, and Charges, 1942*, Ex Parte 148, 248 I. C. C. 545.

[84] *Increased Railway Rates, Fares, and Charges, 1942*, Ex Parte No. 148, 255 I. C. C. 357.

office buildings. Accordingly a request was promptly made of the Company that it furnish information bearing on the following points (Tr. 2446A):

(1) Operating Expenses (detailed by lines operated, if available):
(a) 1942.
(b) 1943 (as much as available).
(c) 1942 (period corresponding to 1943).
(2) Operating Revenue (detailed by lines operated):
(a) Same periods as (1) above.
(3) Income Statement (detailed by lines operated if available):
(a) Same periods as (1) above.
(4) Profit & Loss Account:
(a) Same periods as (1) above.
(5) Balance sheet:
(a) Dec. 31, 1942.
(b) Latest date available.
(6) Road & Equipment:
(a) Same as (5) above.
(7) Nonutility operation:
(a) Revenue.
(b) Expenses.
(c) Balance sheet.
(8) Bonds Outstanding:
(a) Mortgage Bonds.
(*1*) Amounts outstanding at end of 1940, 1941, 1942 and latest date 1943.
(b) Income Bonds.
(*1*) Same as (a) above.

(9) Interchange Revenue from Penna. R. R. (if not detailed on Income Statement):

(a) 1942.

(b) 1943 (as much as available).

(c) 1942 (period corresponding to 1943).

(10) Passenger Volume:

(a) By individual line.

(1) By month—Jan. 1942 to date.

The data sought were prepared by the company and brought to the hearing (Tr. 2227), but it declined to furnish them[85] unless required by the Examiner to do so. The Examiner sustained the company in its refusal (Tr. 2228). He had suggested to the appellees that they seek a modification of the Commission's order of September 18 fixing the limits of the reopened hearing (Tr. 2147, 2148). But when, on October 14 (R. 67), the Director did petition for a modification, his petition was rejected (R. 272).

In view of the marked change in the carrier's fortunes since the close of the record in September 1942, the refusal of the Commission to call for the production of evidence on the points noted above or to modify its order for this purpose, represented a refusal to predicate its action upon actual facts. Furthermore, it represented a refusal to accept even a limited responsibility for the stabilization of the cost of living.

[85] The company had furnished the Director information on item (10) above, but had refused to do so on the other items (Tr. 2228, 2446).

2. *The importance of a fresh record to the establishment of just and reasonable fares in this proceeding was rendered critical by the special circumstances of the case, namely, that the proceeding was initiated on the basis of changing conditions and revenue needs, and that the Commission's June 8 order not only was based on a calculation of revenues to be obtained under changed conditions but also declared the Commission's willingness to modify its order whenever a further change of conditions should render the revenue results to the carrier "materially different" from those estimated*

When a carrier initiates a proceeding on the ground that a change in conditions has brought about certain adverse conditions, such as higher operating costs, and certain favorable conditions, such as the ability of the traffic to bear a higher fare, the carrier is seeking to take advantage of fluctuations in the economy which may alter their course before the proceeding it has initiated is decided. Certainly it is in no position to insist that change in conditions should be considered only up to the point where those conditions begin to become so favorable as to render a fare increase unnecessary. So long as the proceeding is open, so long as evidence as to the effect of changing conditions is readily available, for the Commission to refuse to consider such evidence is both arbitrary and unreasonable.

Especially is this so when the purpose of the proceeding is merely to provide fares yielding

revenues adequate to meet the carrier's current needs. In contrast, a determination of the fair value of a utility's property and the establishment of rates to yield to the utility a fair return over a period of years may be made and adhered to despite known changes in conditions. Both valuation and rate structure are designed to endure all but major cyclical fluctuations. In the instant case, however, the company's move was purely opportunistic.

The nature of the proceeding which the carrier initiated in June, 1942, and its dependence on change of conditions are clearly revealed in the following excerpts from its petition (R. 399–402):

> * * * Despite the increase in the total traffic of petitioner during the current year as a result of the abnormal conditions just specified, the probability is remote that, even during the continuance of such abnormal conditions, the traffic of petitioner will increase by as much as 20 per cent. over such traffic in 1941. (Part XVII.)
>
> Even with a 10-cent fare on the downtown line of petitioner, its total traffic would have to increase 12 per cent. over its total traffic for the year 1941 in order for petitioner to earn its current bond interest requirements, assuming that there should not be any increase in rates of pay of employees, in unit prices of materials and supplies, or in taxes. Petitioner believes and alleges that there is a reasonable probability that its total traffic may in-

crease within a reasonable period to an extent sufficient with a 10-cent fare on its downtown line, to enable petitioner to meet its current bond interest requirements. (Part XVIII.)

It is essential that petitioner promptly obtain the increased gross revenues which will result from an increase in the fare on it downtown line to 10 cents in order that petitioner, without further delay, may have at least a reasonable possibility of meeting the current interest on its bonded indebtedness after providing the public with adequate and efficient railway transportation service, since, despite the increase which reasonably may be expected in the total traffic of petitioner, such additional gross revenues cannot be obtained except by the establishment of a fare of 10 cents on its downtown line. (Part XXII.)

As has been seen, the Commission focused its attention in the proceeding culminating in the June 8 order on the question whether the proposed increase would meet the revenue needs of the carrier. In its order of June 8 the Commission does not pause to inquire whether the carrier's alleged revenue needs are excessive.

The Commission in its order of June 8 stated:

The avowed purpose of respondent in seeking the proposed fare increase is to meet increased operating expenses and the interest on its bonds. This it should be permitted to do if it can be done without

casting an undue burden on any particular traffic.

Moreover, recognizing the hazard that continued change would undermine its calculations, the Commission declared in the same order:

> It should be understood that if at any time prior to the expiration of that period (duration of the war and six months thereafter), by reason of changed circumstances or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing.

Surely it was not necessary for the Commission to compel the economic disturbance incident to a local fare increase in order to determine whether its June 8 calculations were sufficient.

3. *The carrier is in error in its contention that the decision of this Court in Vinson* v. *Washington Gas Light Co. that the restriction on the scope of the particular proceeding there involved was reasonable, constitutes a holding that the Director had no "standing before the Commission entitling him to tender" evidence of this carrier's income under wartime conditions as bearing upon its right to a rate increase*

Under the Act of October 2 utilities and common carriers are required to notify the President's designee of proposed rate increases.

Acting on behalf of the Director, the Administrator must determine whether to oppose an increase. He ordinarily determines whether, in view of the financial position of the carrier or utility and utility rate-making principles giving due effect to the war, the public interest requires that an increase be opposed. An intervening petition is thereupon filed which has always been granted by the regulatory commission.

In the case of public utilities and particularly of carriers engaged in local transportation, one of the basic questions which enters into the judgment of the Director's representative in determining whether to oppose an increase is whether, in view of the improvement of the company's business as a result of the war and the restrictions imposed on competitors, any increase in rates or revenue is necessary. If, after determining, on the basis of an analysis of the company's revenues and operating expenses and such other data as are relevant to the establishment of just and reasonable rates, that a proposed rate increase is not justifiable, the Director were to be denied the right to present such evidence, it is clear that the Congressional intent in creating the notice-and-intervention procedure would be frustrated.

Certainly that intent cannot be effectuated by the presentation solely of testimony with respect to the inflationary effects of rate increases. In the scores of cases before this Commission, in which the Director, through the Price Adminis-

trator, has appeared to oppose rate increases that have seemed to him unnecessary and unjustified, the repeated parroting of the basic principles of inflation control would long since have rendered his participation in the proceedings a waste of time and energy. And, where, as is not infrequently the case, he is the sole protestant, there would be no adequate basis in the record for the Commission's cancellation of the protested rate if the Director's representative were allowed only to read a lecture in elementary economics to the examiner. As has been pointed out, the Commission's staff presents no evidence.

The decision of this Court in *Vinson* v. *Washington Gas Light Co.* affords no basis for the company's assertion. Here the Director intervened in a proceeding of a highly specialized character, relating to a continuing arrangement, composed of, and subject to a complex body of rules. In his effort to demonstrate to the Public Utilities Commission of the District of Columbia that the increase required by the sliding-scale arrangement there in effect was unnecessary, counsel for the Price Administrator (and later the Director) sought to inquire into certain aspects of the company's rate base, rate of return and depreciation under the arrangement. The Commission's refusal to consider these matters was based on its desire not to depart from the established procedure for making the annual determination

of rates under the sliding-scale arrangement. Indeed, it insisted that its rules as to notice precluded it from entertaining such inquiries. The Court of Appeals for the District of Columbia concluded that what the intervenor was seeking was a "complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body." [88]

This Court, in reviewing the action of the Commission and of the Court of Appeals which sustained it, reached the conclusion that the Commission had granted a fair hearing and that it was justified in adhering to the limitations on inquiry imposed by its order of investigation.

Although the Court recognizes—as do we—that an administrative agency may, in the conduct of *quasi*-judicial proceedings, impose reasonable terms on the admission of an intervenor thereto, the judgment in a given case as to what terms are reasonable and what arbitrary, depends on the facts of that particular proceeding. Certainly there is little resemblance between the two cases when thus compared. Far from having given any ground for the belief that he was seeking a complete, or even a protracted, investigation of the company's affairs, counsel for the Director had, as has been seen, carefully arranged for the pres-

[88] *Washington Gas Light Co.* v. *Byrnes*, 137 F. (2d) 547 (Ct. of App., D. C.), quoted in *Vinson* v. *Washington Gas Light Co.*, *supra*.

entation, when the hearing reopened, of pertinent current data bearing directly on the issues as they had been framed both by the company and by the Commission. This basic information was at hand, witnesses were ready to testify, ordered to do so, and still the Commission refused to act—even after, at the suggestion of its Examiner, the Director had petitioned for a modification of the restrictive rule under which the reopened hearing had been conducted.

The terms thus imposed and adhered to by the Commission were not only unreasonable but they were in violation of its fundamental duty not to act on the basis of a record which change of conditions has rendered obsolete.

4. *The company's contention, raised for the first time on this appeal, that, since the appellees did not show that the 8-cent fare would have yielded a fair return on fair value or that the increased fare would have exceeded such a return, the evidence tendered by the Director was irrelevant, is unjustified since the Commission did not find the fair value of the company's railroad properties and the company presented no evidence nor did it request that any findings be made on that issue.*

In Point II of its brief, the company makes the novel contention that the evidence offered by the protestants before the Commission was im-

material and that its exclusion was therefore not a denial of a full and fair hearing. The basis for this position is as follows: First, the Commission could not legally have limited the company to such fares as would yield merely its current bond interest, since the company was entitled to earn a fair return on fair value. Second, the District Court did not find, nor did the appellees contend, that the 8-cent fare would yield such a fair return or the enjoined fares exceed it.

True, no such finding or contention was made. The company had offered no evidence and sought no findings on fair value. It had not attacked the 8-cent fare before the Commission for failing to yield a fair return nor had it made the present argument before the District Court. But the basic objection to the company's contention is that it would establish a standard for the right to fair hearing by which no person could be found to have been denied a fair hearing whose rejected evidence was not, as a matter of law, conclusive of his case. Such a standard would drastically curtail the guaranty.[88a] Applied to this case, it would deny to the Director the right to show that the 8-cent fare would meet current bond interest

[88a] Cf. National Labor Relations Board v. Indiana & Michigan Electric Co. et al., 318 U. S. 9, 28: ". . . Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

requirements until he was prepared to establish the present fair value of the carrier properties devoted to the public service, to show what was a proper rate of return thereon, and to show that the 8-cent fare would have yielded that return. Further, the Director would have had to show that the rate of return yielded by the increased fares would have exceeded that reasonable return.

In other words, in order to achieve the right to a full hearing on the revenue issue, on the basis of which the proceeding was conducted by both company and Commission, the Director must be ready to convert the case into a valuation proceeding. In the light of the *Washington Gas Light Company* case, it is easy to predict what the appellants' arguments would have been had the Director attempted to do so.

If the company now wishes to establish its right to rates higher than 8 cents on the ground that such rates do not yield a fair return, let it petition the Commission for a rate increase on that basis and establish its case by clear and convincing proof, showing from which of its several services it might properly demand the additional revenue. Unless and until that is done, the Director should not be called on to show that a fare which will yield revenue in an amount substantially as large as the Commission found sufficient is not so low as to deny the company a fair return.

D. THE COMMISSION'S ORDERS WERE UNLAWFUL UNDER SECTIONS 1 AND 15a(2) (2) OF THE INTERSTATE COMMERCE ACT, PROPERLY CONSTRUED AND APPLIED IN THE LIGHT OF WARTIME ECONOMIC CONDITIONS AND GOVERNMENTAL CONTROLS

1. *Even though the proviso to Section 1 of the Stabilization Act imposes no limitation on the Commission's authority under the Interstate Commerce Act, nevertheless, the Commission was obligated, in applying the standards prescribed by its own Act, to give consideration and effect to wartime conditions and the stabilization program*

In *Vinson* v. *Washington Gas Light Co., supra,* it was contended on behalf of the Director, that the proviso to Section 1 of the Stabilization Act imposed an obligation on regulatory agencies to grant no increases in rates above the levels prevailing on September 15, 1942, unless such increases were clearly shown to be necessary to aid in the effective prosecution of the war or to correct gross inequities. This Court, however, found no limitation in the Stabilization Act on the "existing powers conferred by law on regulatory commissions throughout the nation."

The Director does not seek a reconsideration of that decision. But he submits that that decision does not relieve this Commission of the obligation, in the exercise of its authority to establish just and reasonable rates, to consider and give effect to war conditions and particularly to the Con-

gressional wartime policy, embodied in the Emergency Price Control and Stabilization Act, to stabilize the cost of living and to avoid unnecessary increases in the cost of the war. Such an obligation is implicit in the concept of "just and reasonable" rates and is fortified by the requirement that agencies of the government accommodate the administration of the policies for which they are responsible to those policies declared by the Congress which impinge on their sphere of operations.

This does not mean that the Commission must invoke new criteria in applying its statutory standards in wartime. It does mean that the Commission must be more vigilant and rigorous in employing the criteria which its statute now prescribes. Section 15a(2) of the Interstate Commerce Act requires that, in determining whether proposed rates are just and reasonable, the Commission must give due consideration to the factors specified therein, among them

> the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

In view of this provision, it seems clear that the Commission could not have given adequate

effect to wartime conditions and to the stabilization program, unless it had found that the increased fare burdening the users of the company's downtown line (1) represented "the lowest cost consistent with the furnishing of such service" and (2) was required by "the need of revenues sufficient to enable" the company "under honest, economical, and efficient management to provide such service."

The protestations by the Commission in its report of November 2 and in its brief [87] that it did not disregard the stabilization program can best be tested by whether it met the statutory criteria set forth. This test can be made in the light of the record upon which the Commission acted, without reference to the evidence which the Director tendered at the reopened hearing and which, the Commission insisted, it considered before concluding that it would not be "warranted in modifying (its) findings as made in the second report."

However, before turning to consider whether the Commission complied with the criteria expressed in its statute, attention must be directed to the Commission's erroneous assumption that, because the increases in fare were small in absolute amount, they would not conflict with the stabilization program. As the Commission put the matter in its June 8 order:

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[87] Commission's Brief, p. 50 ff.

> It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible. We believe, therefore, that the increased fare herein, approved will not be in conflict with the Emergency Price Control Act of 1942, as amended.

The Commission's adherence to this point of view represented in effect a disclaimer of responsibility for the inflationary effects of its actions. The Commission never is called upon to authorize a rate or fare increase which is large in absolute terms. Apparently it is only when a vast multitude of these small increases is aggregated in a single action, as in *Ex parte 148,* that the Commission grows conscious of its stabilization duties.

Since this error vitiated the Commission's whole approach to the problem of applying its statutory standards in wartime, the statutory court was correct in selecting it as one of the two errors to be cited as grounds for its injunction. The court's position was amply buttressed by the opinions of the Emergency Court of Appeals dealing with the same issue, to which the statutory court referred in the following passage from its opinion.

The gauge urged on behalf of Director Vinson was that set out in *U. S. Gypsum Co.* v. *Brown,* 137 F. 2d 360, where the United States Emergency Court of Appeals, speaking through Chief Judge Maris said at page 364:

"The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral. See *Lincoln Sav. Bank* v. *Brown,* 137 F. 2d 228."

In the case of *Philadelphia Coke Company* v. *Chester Bowles,* U. S. Emergency Court of Appeals, December 15, 1943, not yet officially reported, the Court said:

"In a complicated economy such as ours the phenomena of price increases are the result of a complex of causes, the interaction of many economic forces. When inflationary pressure is one of the major forces operating in the economy it is wholly unrealistic to consider the price of a single commodity as in an economic vacuum and say that no threat of an inflationary increase can be discovered. Each commodity price must then be considered in the light of the fact that it forms an integral part of the whole price structure."

That the need to be vigilant against the unnecessary small increase cannot be made to depend

on direct evidence of its inflationary character is also made clear by the Emergency Court in the *Philadelphia Coke Co.* case, *supra,* when it added:

> To stabilize prices in an economy the whole of which is under general inflationary pressure involves holding them steady against any and all increases even though it may not be apparent that such increases have been brought about by inflationary pressure or that they will in their turn tend to increase such pressure upon the prices of other commodities.

In the briefs of the company [88] (which is natural) and the Commission [89] (which is surprising) appears an attempt to make capital of the underlined passage in the following quotation from the exceptions to the examiner's report filed by the Price Administrator on behalf of the Director in the original proceeding. Since this action so sharply underscores the Commission's failure to appreciate the nature of its stabilization obligations, the passage will be quoted in the context in which it originally appeared:

> We apparently were in error in our assumption that the elementary factors which contribute to the inflationary spiral would be readily understood by those interested in the reading of our brief. What we had reference to was that spiral which starts

[88] Company's Brief, p. 83.
[89] Commission's Brief, pp. 8, 29.

with increases in cost of necessary living items. The pressure placed on the individual by the snowballing of such increases occasions him to demand higher wages. The employer needs increased revenues to offset increased operating costs resulting from such increased labor costs. Thus the circle is complete. Then the same things continue the spiral until we are ultimately faced with the threatened destruction of our economy by inflation. To this we had reference. *We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine.* But rather we suggested that such increase when coupled with other increases in the cost of living commence the rise of that spiral, which, if not arrested, must lead inevitably to the pitfall of inflation. It was not said that the increase of fares in itself "would ultimately result in disastrous inflation." We ask that the report be corrected to conform to the facts.

2. *On the record before the Commission, it could not reasonably conclude that the increased fare which it authorized was "the lowest cost consistent with the furnishing" of "adequate and efficient railway transportation service" or that it was necessary to meet "the need of revenues sufficient to enable the carriers, under honest,*

economical, and efficient management to provide such service"

The Commission in its second report made such calculations as to future wartime traffic trends and revenues as the state of the record before it permitted. The calculations which it made, worked out with respect to 8-, 9- and 10-cent fares, are indicated in the accompanying table.

It is evident that, on the Commission's own estimate, the 8-cent fare would have enabled the carrier to earn approximately $30,000 more than full interest on its bonds if provision is made, in the calculation of its income, for $240,000 a year which the company was accruing to a "War Risk Reserve," and for $150,000 which the Commission found to be the minimum amount to which the company was entitled by increased divisions of joint fares.

Computing the accruals and prospective divisions in the same way, a 9-cent fare would have yielded about $250,000 more than full bond interest and a 10-cent fare, over $400,000. Moreover, these computations are made on the basis of interest charges on bonds outstanding as of August 31, 1942, whereas the company's practice of buying its bonds at greatly depreciated market prices would have brought about some reduction in these charges during the course of the year.

An Analysis of the Commission's Own Estimate of the Effect of the Increase Authorized in the 8-cent Fare in the Light of the Company's Bond Interest Requirements

Source of Income	8¢ fare	9¢ fare	10¢ fare
Income available for interest on bonded indebtedness, as estimated by Commission	$2,181,460	$2,404,502	$2,564,144
Amount accrued by carrier to War Risk Reserve, improperly treated by Commission as a legitimate operating expense	240,000	240,000	240,000
Increased divisions of joint fare [1]	150,000	150,000	150,000
Total income	2,571,460	2,794,502	2,954,144
Amount required to pay full interest on bonded indebtedness outstanding on Aug. 31, 1942 [2]	2,541,053	2,541,053	2,541,053
Excess income under the several rates of fare	30,407	253,449	413,091

[1] The Commission did not find the precise amount which the carrier should realize from increased divisions, but stated that "If no more than the 10 percent increase as made in the joint fares (under Ex Parte 148) were reflected in the divisions of respondent, its revenues would be increased by about $150,000 a year." The carrier's witness contended that increased divisions would bring in $170,000 at most and would not meet the full revenue needs (Tr. 2024). Witnesses for protestants contended that an equitable division of the joint fares would yield a far larger sum (Tr. 1426-7, 1640-3).

[2] As of August 31, 1942, petitioner's outstanding funded debt and the annual interest requirements thereon were as follows:

Series	Principal Amount	Annual Interest Requirements
First Mortgage Bonds, 4.5%	$783,520	$35,258.40
First Lien and Refunding Bonds, 5%	26,572,948	1,328,647.40
Adjustment Income Bonds, 5%	23,542,950	1,177,147.50
Total	50,899,418	2,541,053.30

The above bonds are being systematically retired by the management with available cash at an average rate over the past six years in excess of $100,000 principal amount a month and at an average price of about $40 cash per $100 principal amount of bonds. During the first 8 months of 1942 the company retired $991,000 principal amount of bonds. (Tr. 1315-9, 1833-7, 1855, 1862.)

The Commission characterized the "War Risk Reserve" as "reasonable" on the basis of a vague allusion by the company's president to risk of war damage to "vulnerable spots" in its lines. (Tr. 1264.) At the reopened hearings, the company's counsel objected to questions which would have revealed the true purpose and use of the Reserve (Appendix 22–23), but when protestants later showed that about $400 per year would buy $240,000 in war-risk insurance (id. 45–46), he sought to explain the Reserve as a protection against "damage due to speed-up of war traffic or drafting of experienced employees." Actually, the Reserve constituted a part of the carrier's free income, and, except as expended for the purposes for which accrued, should not have been charged to the rate payers.[90] The Commission's

[90] Cf. Spring Canyon Coal Co. v. Commissioner of Internal Revenue, 43 F. 2d 78 (C. C. A. 10th), cert. den., 284 U. S. 654 (self-insurance not deductible expense).

The accruals to War Risk Reserve, along with accruals to the carrier's depreciation reserve, have been applied in retiring the carrier's bonds. Though the carrier was seeking additional revenue from the rate payers to cover its alleged needs, what the carrier in effect was asking, and what the Commission purported to allow, was an increase in rates which would yield revenues sufficient not only to pay full interest on all the outstanding bonds, but also to pursue a policy of retiring the bonds as well.

The policy thus sanctioned by the Commission works a twofold injustice: (1) an injustice to the bond holders by including as an operating expense $240,000 a year not properly chargeable thereto, thereby minimizing the carrier's earnings and depreciating the market value of the bonds;

failure to recognize this fact in determining the revenue needs of the company renders arbitrary and unreasonable its finding that a fare increase was necessary.

The inclusion of the factor of $150,000 for interline divisions represents a minimum recognition of the company's obligation to seek other sources of revenue before adding to the burdens of the downtown line. Apart from the light which the addition of this minimum estimate of the amount procurable by more equitable divisions casts on the company's claim of need for an increase in its 8-cent fare, the granting of any increase by the Commission while the company remained delinquent in pursuing this other source of revenue was, we submit itself an unlawful abuse of discretion, imposing an unwarranted and discriminatory burden upon passengers on the downtown line.

In its original report and order of July 11, 1938 (227 I. C. C. 741, 762), the Commission had stated that if the company "should feel impelled to seek a further increase in revenue [above that produced by the 8-cent fare prescribed in that order] it should consider doing so on interline traffic." The Commission's decision containing this declaration was upheld by the

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and (2) an injustice to the rate payers in requiring them to provide funds, under the misnomer of operating expense, with which the carrier can purchase these bonds in the open market at the prices thus artificially depreciated.

United States District Court for the District of New Jersey, *Hudson & Manhattan R. R. Co.* v. *United States*, 33 F. Supp. 495 (1940), in a ruling affirmed by this Court in *Hudson & Manhattan R. R. Co.* v. *United States*, 313 U. S. 98 (1941). In that report, after discussing in detail the nature of the services performed by the company for the Pennsylvania and the existing divisions, the Commission noted the company's protestations that it was "not in a position to seek an increase in those divisions until its present local fare on the downtown line has been increased." And although the Commission then authorized an increase in the downtown fare from 6 to 8 cents, the company did absolutely nothing by way of formal action before the Commission seeking an increase of divisions, from the time of that litigation down to the present. Despite the alleged extremity of its need, it did not even seek greater divisions when in *Ex Parte 148*, the Pennsylvania's commutation fares were raised by 10 percent.

It is apparent that it is a stock refuge for the company to point to the alleged necessity of an increase in downtown fares before it can seek equitable divisions from the Pennsylvania; in its report of June 8, 1943 (255 I. C. C. 649), the Commission, in discussing the possibility of increased divisions with the Pennsylvania, again referred to the carrier's belief that it would "regard itself in a better position to seek an increase in

the downtown division, at least to 8.64 cents," if the "downtown fare were increased to 10 cents." Yet it will be observed that the interline divisions have remained at the same figure since 1923 (Tr. 1296), and that when the downtown single fare was 6 cents, the joint interline fare was 7.64 cents, so that it would seem that mere excess of the single fare over the interline is not an insuperable obstacle to securing a more equitable division of joint fares. From 1918 until 1938, when the downtown local fare was increased to 8 cents, the single fare did not exceed the division (Tr. 1299).

In its reports of June 8th and August 3rd, the Commission repeated its admonition that increased interline divisions be sought, but apparently credited the carrier's highly discountable assurance that it would "undertake to seek promptly such increased divisions * * *;" despite proof that in the past it had done nothing on that score. *At the reopened hearing, it was admitted that the company had done nothing concretely by way of negotiating with the Pennsylvania* (Tr. 2199).

The injustice of the Commission's action in granting an increase in the fares payable by the users of the downtown line is made the more manifest by the Commission's prior recognition of the propriety of a differential between the fare payable on that line and the fare payable on the uptown line. Its November 2 action making the two fares identical was taken without the receipt

of any further evidence to controvert its 1938 conclusion that—

> From the standpoint of the cost of service to respondent, therefore, as well as the value of the service to the passenger, it would seem that if 10 cents is a maximum reasonable fare for the uptown service the reasonable fare for the downtown service must be something less than 10 cents.[91]

Under these circumstances, the failure to maintain the differential constitutes a discriminatory exploitation of the users of the downtown line, made possible only by the fact that, automobile transportation having been sharply curtailed for war need, the traffic on that line could bear the increased charge. Certainly section 15a (2) confers no license to take such action.[92]

3. *Measured by its impact on the company's investors and patrons, the Commission's action in increasing the prices on the downtown line was unwarranted and inconsistent with the national stabilization policy. The increase should have been denied as unjust and unreasonable*

Sitting in review of the action of an administrative tribunal, this Court is concerned with the

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[91] 227 I. C. C. 741.

[92] If a given rate is all the service is worth, or if a given service is already paying more than its justly allocable share of the total burden, the carrier must look elsewhere for revenue. *Covington and Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596; *American Toll Bridge Co.* v. *California R. R. Comm.*, 307 U. S. 486.

total effect of the action. It is concerned lest, enmeshed in the technical detail of rate making, the regulatory agency should lose sight of the actual impact of its action upon the individuals or groups who are subject to it. It is concerned also lest that agency, its attention focused sharply on the policies entrusted to its charge, should fail to give due weight to complementary or even conflicting policies which the Congress may have declared. This latter problem, discernible here more clearly than in the *Washington Gas Light Co.* case, is not necessarily a problem of the respective powers of competing agencies for, as here, the demarcation of jurisdiction as between agencies may be clear. Essentially, it is a problem in the effectuation of Congressional policies, a problem peculiarly within the province of this Court to resolve and distinguishable from the more usual problem of the finality of administrative decision in that the controlling considerations in a particular case may as well fall *without* as within the agency's field of special competence.

a. The investor's interest

If the Commission had found the proposed fare increase unjust and unreasonable, what would the impact of its decision have been on investors in the company's securities? Would such an effort by the Commission to comply with the exigencies of stabilization have exacted an undue sacrifice

of the investor interest, even recognizing the fact that investors in fixed income securities are especially the beneficiaries of stabilization? To answer this question, a brief reference is necessary to the company's financial background, already sketched in our counter-statement of the case.

As far back as 1920 the company, in seeking a fare increase, realized the fact that the common stockholders had no equitable claim, and that their securities were in fact worthless. In 1920 the company wanted, as it did here, only enough revenue to pay bond interest. And the Commission held that the stock was only water, in holding:

> Most of the stock was distributed as a bonus with bonds and a large part of it is now held by the Hudson Companies. No dividends have ever been paid on the stock and respondent states that it is not seeking additional revenue for the purpose of paying dividends on the stock, but only to provide payment of interest on its funded debt. (58 I. C. C. 270, 275–6.)

On this watered stock the company paid $11,402,496 in dividends between 1925 and 1932. Even though nothing has been paid since, the stockholders, as a class, have been treated royally. In its order of June 8, 1943, the Commission found that the original cost, less retirements, of the railroad properties was $66,541,352 and stated:

"The original cost *less depreciation* does not appear" (R. 252). [Emphasis supplied.]

In that same order, the Commission found that as of August 1942, bonds outstanding and allocable to railroad properties amounted to $50,899,418. It is now over 35 years that this road has been in operation, substantially as it now exists. We may fairly conclude that the property has depreciated at least $16,000,000, or 25 percent in the last 35 years. If that be true then there *is* no equity left for the stockholders. In fact there is little doubt but that on reorganization, even the income bonds could not be converted at par. Thus in talking of investors, we may consider only the bondholders.

And how have these investors fared? First mortgage bondholders are getting 4½ percent on par, but these bonds selling as they do at about 70,[93] the current yield is about 6½ percent. The first and refunding bonds pay 5 percent on par, and 7¾ percent on the current market price. The income bonds are selling at about 28 (as appellees offered to prove) (Tr. 2222) and a 5 percent coupon means an 18 percent return on the market price. It is this return of 18 percent that the company is asking *as a minimum* when it talks of meeting full bond interest on its income bonds.

[93] Fitch Bond Record, Quotation Edition #1916, April 18, 1944.

Moreover, the appellees would have undertaken to prove, if permitted, that the company is now earning *full* income bond interest at the existing 8 cent fares.

Under these circumstances, to increase fares to the company by from 13 to 25 percent in order to increase earnings of income bondholders above the 18 percent level would be to sacrifice the user to the investor interest. It is only by virtue of a greatly overstated capital structure, long in need of overhauling, that the company can demand fantastic earnings under the guise of "meeting bond interest."

The indulgence to the investor interest becomes still more marked when it is recalled that the uptown line, though making some contribution to bond interest, is unprofitable, with the result that the entire contribution to the income of the investors is exacted from the users of the downtown line. Not only must they pay a fare sufficient to yield an adequate return on the relatively small investment in the properties serving them but they are being called to assure such a return on the entire carrier investment, including the relatively large investment in the obsolescent uptown lines.

b. The user's interest

The impact of the fare increase on the users of the downtown line has already been shown to be inflationary in effect. Apart from this aspect

of the increase, however, it should be observed that it represents the culmination of a movement which has carried the price of the service from 6 cents just 6 years ago to $9\frac{1}{11}$ cents for the steadfast buyer of tokens and to 10 cents for the less faithful majority. This increase of from more than 50 percent to $66\frac{2}{3}$ percent over the 1938 fare level should be contrasted with the fact that the Bureau of Labor Statistics index of street-car fares and bus fares rose from its June 1939 base of 100 to the level in August 1943, of 101.1 and 101.8, respectively (Tr. 2452).

It should be recalled, moreover, that just before the Commission issued its June 8th order, it directed the suspension of the 10 percent increase in commutation fares which it had ordered in *Ex Parte 148*.

Street car fares are one of the five largest items among the 198 separate items (exclusive of rent) which enter into the Cost-of-Living Index of the Bureau of Labor Statistics.[94] When the Interstate Commerce Commission dismisses an increase of $6.76 per year for the steady buyer of tokens as negligible in its impact upon the public, it has demonstrated that it has lost touch with economic and social realities. Certainly it has failed to discharge its responsibility to the national stabilization policy.

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[94] Bureau of Labor Statistics of the Department of Labor, document Serial No. R. 1156, March 15, 1940, Table 2, page 6; *id.* L. S. 43–5934, Table No. 1.

CONCLUSION

We submit that this Court should affirm the judgment of the statutory court, setting aside the orders and remanding the proceeding to the Commission for further hearing and reconsideration.

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AUTHORIZATION

I have authorized the filing of this brief.

CHARLES FAHY,
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APPENDIX OF STATUTES AND EXECUTIVE ORDERS

Interstate Commerce Act, Sections 1 (1), 1 (5) (a), 15a (49 U. S. C., Secs. 1, 15, 15a):

SECTION 1 (1), *"Carriers subject to regulation.* The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for continuous carriage or shipment; * * *"

SECTION 1 (5) *"Just and reasonable charges required; classification of messages, and rates; exchange of services.* (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

SECTION 15a. *"Fair return for carriers.* (1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto."

"(2) In the exercise of its power to prescribe just and reasonable rates the Com-

mission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. * * *"

The Emergency Price Control Act of 1942, 56 Stat. 23:

Sec. 1 (a) (50 U. S. C. App., Supp. II, § 901 (a)):

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in

securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Sec. 302 (c) (50 U. S. C. App., Supp. II, § 942 (c)):

* * * *Provided,* That nothing in this Act shall be construed to authorize the regulation of * * * (2) rates charged by any common carrier or other public utility * * *.

Act of October 2, 1942, c. 578, 56 Stat. 765:

That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided,* That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the

timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2:

The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

* * * * *

Sec. 7:

* * * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulations, price schedule, or order issued or effective under this Act.

Executive Order No. 9250 (7 Fed. Reg. 7871):

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to aid in Pre-

venting Inflation, and for Other Purposes," as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

Title I—Establishment of an office of economic stabilization:

* * * * *

4. The guiding policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the development of such legislative programs as may be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director.

* * * * *

Id., Title VI—General Provisions:

4. The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942.

Executive Order No. 9328, par. 4 (8 Fed. Reg. 4681, 4682):

> The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal state, or municipal law in order to keep down the cost of living and effectuate the purposes of the stabilization program.

U. S. GOVERNMENT PRINTING OFFICE: 1944